(29,501) 1,24

(29,502)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 266.

AIR-WAY ELECTRIC APPLIANCE CORPORATION, APPELLANT,

vs.

HARRY S. DAY, TREASURER OF THE STATE OF OHIO; JOSEPH T. TRACY, AUDITOR OF THE STATE OF OHIO; JOHN R. CASSIDY, ET AL., ETC.

No. 267.

HARRY S. DAY, TREASURER OF THE STATE OF OHIO; JOSEPH T. TRACY, AUDITOR OF THE STATE OF OHIO; JOHN R. CASSIDY, ET AL., ETC., APPELLANTS,

vs.

AIR-WAY ELECTRIC APPLIANCE CORPORATION.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 15, 1923.

[fol. 1] IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

AIR-WAY ELECTRIC APPLIANCE CORPORATION, Plaintiff,

vs.

R. W. ARCHER, TREASURER OF THE STATE OF OHIO; JOSEPH T. Tracy, Auditor of State of the State of Ohio; John R. Cassidy, C. E. Forney, Daniel J. Ryan, as the Tax Commission of the State of Ohio, and Harvey C. Smith, Secretary of State of the State of Ohio, Defendants.

BILL OF COMPLAINT—Filed Nov. 29, 1921

Now comes Air-Way Electric Appliance Corporation, and for its cause of action against R. W. Archer, Treasurer of the State of Ohio, Joseph T. Tracy, Auditor of State of the State of Ohio, Harvey C. Smith, Secretary of State of the State of Ohio, John R. Cassidy, C. E. Forney, Daniel J. Ryan, as the Tax Commission of the State of Ohio, says that it is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with its principal office in said State in the city of Wilmington, and that it is a citizen of the State of Delaware; that the defendant R. W. Archer is the duly elected, qualified and acting Treasurer of the State of Ohio, that he is a citizen and resident of the City of Columbus, State of Ohio; that Joseph T. Tracy is the duly elected, qualified and acting Auditor of the State of Ohio, that he is a citizen and resident of the City of Columbus, State of Ohio; that John R. Cassidy, C. E. Forney and Daniel J. Ryan are the duly appointed, qualified and acting Tax Commission of the State of Ohio and that they and each of them are citizens and residents of the State of Ohio; that Harvey C. Smith is the duly elected, qualified and acting Secretary of State of the [fol. 2] State of Ohio, that he is a citizen and resident of the City of Columbus, State of Ohio; that this suit is brought under the Constitution of the United States of America, and that the amount involved is in excess of $3,000.00, exclusive of costs and interest, and that said suit is brought further for the purpose of enjoining the placing of a cloud upon plaintiff's title and for the purpose of removing a cloud, if any exists, upon the title of the plaintiff corporation's property situated and located within the State of Ohio;

That the Air-Way Electric Appliance Corporation is engaged in the business of manufacturing electric vacuum cleaners, automobile cleaners, electric washing machines, electric motors, bell ringing transformers and other electric household appliances; that all of its property is located in the City of Toledo, Lucas County, State of Ohio; that in the State of Ohio there are many domestic corporations engaged in practically the same business as the plaintiff cor-

poration, and with which the plaintiff corporation is engaged in active competition for business in their particular fields;

That the Air-Way Electric Appliance Corporation has an authorized capital stock under its certificate of incorporation of 400,000 shares of non-par value stock, which said stock is divided into 200,000 shares of common stock and 200,000 shares of founders stock; that the only difference between the two classes of stock is that the holder of the founders stock is entitled to five votes for each share of stock while the holder of the common stock is entitled to one vote for each share of stock which he holds; that of the authorized amount of capital stock there is paid, issued, subscribed for and outstanding 2,242 shares of common stock and 45,052 shares of founders stock; that the balance of the stock of said corporation has never been subscribed for or issued;

[fol. 3] That the business transacted by said corporation is done through distributors, jobbers, agents and dealers throughout the United States; that the product of said corporation is shipped from its local plants in the State of Ohio to its customers outside of the State of Ohio or shipped to various warehouses in its own name from which said warehoused stock the jobbers and dealers are allowed to draw under certain conditions, and that the major portion of its business is business solicited and carried on in interstate commerce;

That the value of the assets of the plaintiff corporation over and above its liabilities situated in the State of Ohio is $588,866.56;

That plaintiff corporation was incorporated July 23, 1920; that shortly after the incorporation and organization of plaintiff corporation in the State of Delaware, its directors and officers took proper steps and procedure under the laws of the State of Ohio for the purpose of obtaining a license and right to conduct its business in said State; that it has complied with Sections 178, 179 and 180 of the General Code of the State of Ohio and has paid the required fee of $50.00 and received a certificate of admission to do business in the State of Ohio from the Secretary of State; that it has also complied with Sections 181, 183 and 184 of the General Code of Ohio in reference to its first franchise fee, and did pay approximately $4,000.00 to the Secretary of State of the State of Ohio under said sections; that by reason of the foregoing said corporation is authorized as a foreign corporation to do business within the State of Ohio and that it has been and now is lawfully doing business in said State;

That the plaintiff corporation paid all of the license and franchise fees which have been assessed against the corporation, and has also [fol. 4] paid any and all taxes due the State of Ohio and the County of Lucas;

That shortly after the organization of said corporation the stockholders and directors thereof desired to sell its securities in the State of Ohio, and that it complied with all of the laws, to-wit, the law commonly known as the Blue Sky Law of the State of Ohio in reference to the sale of said securities; that during the month of October, 1920, the plaintiff corporation received a certificate from the Department of Securities of the State of Ohio, authorizing the sale

of its common and founders stock at a price of $7.00 per share for each share of stock, and plaintiff represents that said stock is of the value of approximately $7.00 a share at the present time;

That on or about July 30th, 1921 the plaintiff was required to and did file a report with the Tax Commission of the State of Ohio, under Sections 5499, 5500 and 5501 of the General Code of the State of Ohio, upon a blank which was furnished plaintiff corporation by the Tax Commission of the State of Ohio; that on or about November 1st, 1921, plaintiff corporation received from the Treasurer of the State of Ohio a tax bill, which reads in part as follows:

"As required by Section 5503 General Code, notice is hereby given that an annual fee for the year 1921 is assessed against the company as follows: * * * 400,000 shares of authorized common stock without par value represented by property and business in Ohio, at five cents per share, $20,000.00."

That the Ohio statutes and the bill from the Treasurer require said tax to be paid by December 1st, 1921.

Section 5503, General Code of the State of Ohio, which said section has not been amended or repealed, provides as follows:

"On or before October 15th the Auditor of State shall charge for collection as herein provided annually from such company in addition to the initial fee otherwise provided for below, for the privilege [fol. 5] of exercising its franchise in this State, a fee of three-twentieths of one per cent, upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in this State, which fee shall not be less than $10.00 in any case. Such fee shall be payable to the Treasurer of State on or before the first day of the following December."

Plaintiff further says that in spite of the fact that said bill states that it was rendered as required by Section 5503, the computation made by the Auditor of State shows conclusively that a mistake was made in figuring the tax which, according to said Section, should be 3/20 of 1 per cent upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in this State, which fee shall not be less than $10.00 in any case; that the property owned and used by plaintiff corporation and business done in this State for the year 1920 was $708,873.14, which said business and property was at said time represented by 2,242 shares of common stock and 45,052 shares of founders stock. If the tax were to be computed on the value of said number of shares of founders stock and common stock, the tax should have been computed at 3/20 of one per cent upon the entire value of said stock and property, or in the amount of $1,063.32;

That the foregoing mistake was called to the attention of the Tax Commission of the State of Ohio and the Attorney General's Office of the State of Ohio, both of whom decided that no mistake had been made by the Tax Commission or Auditor of the State of Ohio, and insisted that the tax in the amount assessed must be paid; that the

action of the Tax Commission, Auditor of State and Treasurer of the State of Ohio as taken was not authorized under Section 5503 of the General Code of the State of Ohio, and as Section 5506 of the General Code of Ohio provides that the tax assessed hereunder shall be the first and best lien on all the property of the public utility or cor-
[fol. 6] poration * * * an illegal lien and cloud upon the title of the property of the plaintiff corporation has been created;

That Section 5503 of the General Code of the State of Ohio hereinabove quoted is unconstitutional and void under the Fourteenth Amendment of the Constitution of the United States of America, in that it denies the plaintiff the equal protection of the laws and is contrary to the foregoing mentioned amendment, which reads as follows:

"No State shall make or enforce any laws which deny to any person within its jurisdiction the equal protection of the laws";

That the domestic corporations with whom the plaintiff corporation is required to compete are assessed as a franchise fee under Section 5498 of the General Code "a fee of 3/20 of 1 per cent upon 'its subscribed or issued and ou-standing' capital stock"; that the legislature of the State of Ohio has created an unreasonable and arbitrary classification in the provisions herein set forth in that greater burdens are placed upon a domesticated foreign corporation which is already admitted to do business in the State of Ohio, than upon a similar domestic corporation; that there is no justness or reason for assessing 3/20 of 1 per cent on the "authorized capital stock" of a foreign corporation and only 3/20 of one per cent upon the "subscribed or issued and outstanding stock" of the domestic corporation;

That said law is unconstitutional in that it confiscates plaintiff's property without compensation or due process of law, as prohibited by the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

"No State shall make or enforce any law which shall deprive any person of life, liberty or property without due process of law";

[fol. 7] That there is no appeal provided by the Statute of the State of Ohio from the finding of the Tax Commission or Auditor of State or Treasurer of Ohio, and that the amount as charged for collection by the Auditor of the State of Ohio becomes a lien against the property of the plaintiff corporation;

That said law is in violation of Section 2, Article 1 of the Bill of Rights of the Constitution of the State of Ohio, which provides:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit * * *"

That the arbitrary and unreasonable classification between a domesticated foreign corporation and a domestic corporation is a denial of the equal protection of the law.

That said law is unconstitutional under the Constitution of the State of Ohio, which provides in Article 12, Section 2:

"Laws shall be passed taxing by uniform rule all moneys, credits, investments in bonds, stock and joint stock companies or otherwise, and also all real and personal property according to its true value in money";

That said law is contrary to said provisions of the Constitution in that the tax is not assessed by a uniform rule as between a foreign corporation authorized to do business in the State of Ohio and a domestic corporation; that the classification made by the legislature of the State of Ohio is in fact based upon an assumed rather than a substantial classification between the domesticated foreign and domestic corporations; and in that it does not provide that the tax is to be assessed according to its true value in money;

Plaintiff further says that even though the tax bill sent plaintiff by the Treasurer contains the words and figures hereinabove set forth, that it may have been rendered under Section 8728-11 Gen- [fol. 8] eral Code of the State of Ohio, as amended 109 Ohio Laws, page 27, which provides in part as follows:

"The amount of fees payable by a foreign corporation having common stock without par value * * *; and under Section 5503 shall be 3/20 of 1 per cent upon the proportion of the authorized preferred stock represented by property owned and used and business transacted in this State, and five cents per share upon the proportion of the number of shares of authorized common stock represented by property owned and used and business transacted in this State, but not less than $10.00 in any case."

That in case such is the contention made by the defendants herein, it is likewise the contention of the plaintiff that said law is unconstitutional in that the State of Ohio has passed a law which denies to a citizen of a foreign state the equal protection of the laws as prohibited by the Fourteenth Amendment to the Constitution of the United States of America, which provides:

"No State shall make or enforce any laws which deny to any person within its jurisdiction the equal protection of the laws";

That said law does deny to the plaintiff corporation the equal protection of the laws in that the tax assessed is based upon the "authorized capital stock" of plaintiff corporation, even though all of its property is situated in the State of Ohio and only 45,052 shares of founders stock and 2,242 shares of common stock are subscribed, issued and outstanding, while if plaintiff corporation were a domestic corporation with all of its property located in the State of Ohio it would only be required to pay upon the number of shares "subscribed, issued or outstanding," which said tax as against the domestic corporation would be approximately $2.364.70 and against the foreign corporation $20,000.00; all of which is grossly unfair and

unjust because plaintiff is engaged in active competition with such domestic corporations;

That said law is unconstitutional in that it confiscates plaintiff's property without compensation or due process of law as prohibited [fol. 9] by the Fourteenth Amendment to the Constitution of the United States of America, which provides:

"No state shall make or enforce any law which shall deprive any person of life, liberty or property without due process of law";

That there is no appeal provided by the statutes of the State of Ohio from the findings of the Tax Commission, the Auditor of State or Treasurer of the State of Ohio and that the amount as charged for collection by the Auditor of the State of Ohio and billed by the Treasurer of the State of Ohio becomes a lien against the property of the plaintiff corporation;

Said law is in violation of Section 2, Article 1 of the Bill of Rights of the Constitution of the State of Ohio, which provides:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit * * *";

That the arbitrary and unreasonable classification between a domesticated foreign corporation and a domestic corporation is a denial of the equal protections of the law.

That said law is unconstitutional under the Constitution of the State of Ohio, which provides, Article 12, Section 2:

"Laws shall be passed taxing by uniform rule, all moneys, credits, investment in bonds, stocks, joint stock companies or otherwise, and also all real and personal property according to its true value in money."

That said law provides a method of taxation which is not uniform as the classification between a foreign corporation authorized to do business in the State and a domestic corporation of the State of Ohio and is based upon an unreasoanble and assumed rather than substantial classification between them; that the tax as assessed does not tax by uniform rule in that it is in effect a double tax upon property, for it bases the tax upon the proportion of the amount of [fol. 10] property and business done in the State of Ohio to the authorized capital stock of the company;

The State of Ohio and its taxing subdivisions already tax to the full extent allowed by law all of the property of the plaintiff corporation;

Said law is in violation of said provision of the Constitution of the State of Ohio in that it does not tax property according to its true value in money.

The Commissioner of Securities of the State of Ohio as hereinabove set forth has formally authorized plaintiff corporation to sell its securities in the State of Ohio for the sum of $7.00 per share;

that it has subscribed, issued and outstanding all told but 47,294 shares of stock at a value fixed by the State of Ohio of $7.00 per share, which totals the sum of $331,079.00, which should be the value of the franchise exercised by it within the State of Ohio and should be the basis, as long as the State has fixed a value of the stock, upon which the State should tax the real and personal property of the plaintiff corporation, but instead of so doing the State has fixed an arbitrary and confiscatory rate of five cents a share upon non-par value on the authorized capital stock;

That under Section 5506 of the General Code of the State of Ohio a lien will be or has attached to the property of the plaintiff corporation as of July 31st, 1921, which said lien is based upon an unconstitutional law, as hereinabove set forth; that said lien is a cloud upon the title of the plaintiff corporation to its property in the State of Ohio;

That in the event said tax were paid by plaintiff corporation and litigation started to recover said tax back, it would be years before it would finally be accomplished, and in the meantime the $20,000.00 paid for said illegal and unconstitutional tax would be drawing no interest of any sort; that if said $20,000.00 were employed in the business of the plaintiff corporation it would be making a fair return thereon each year; that it would be unjust and unfair and unequitable to require plaintiff corporation to pay said tax and then sue to recover back the same;

[fol. 11]

That the laws of the State of Ohio provide no adequate remedy at law for the plaintiff under the peculiar circumstances existing and hereinbefore mentioned;

That Section 5509 of the laws of the State of Ohio provides that if a foreign corporation does not pay its tax within the time prescribed, the Tax Commission of the State of Ohio shall so certify to the Secretary of State, and the Secretary of State shall thereupon cancel the certificate of authority of such foreign corporation to do business in this State, and thereupon all powers and privileges and franchises conferred upon such corporation * * * by such certificate of authority shall cease and determine. The Secretary of State shall immediately notify such foreign corporation of the action taken by him;

That if the Tax Commission of the State of Ohio would certify the fact of non-payment of this unconstitutional and illegal tax to the Secretary of State, and is not enjoined from doing so the business of the plaintiff would be irreparably damaged;

That if the Secretary of State should cancel the certificate of authority of the plaintiff corporation for doing business in the State of Ohio, the plaintiff would necessarily cease to operate its factories in the City of Toledo, Lucas County, Ohio, where it employs from time to time more than 200 workmen and artisans, which would also irreparably damage plaintiff's business;

That Section 5510 of the General Code of the State of Ohio provides that any person or corporation who shall exercise or attempt

[fol. 12]

to exercise any powers, privileges or franchises under the certificate of authority after the same is cancelled, as provided in

the preceding paragraph, shall be fined not less than $100.00 nor more than $1,000.00; that plaintiff corporation could not afford, if its certificate of authority were illegally cancelled by the Secretary of State of the State of Ohio, to cease business, and that the penalty prescribed in the foregoing section is prohibitive and confiscatory;

That the plaintiff hereby expressly waives the filing of an answer under oath and consents that the defendants and each of them may answer this bill without verifying the same;

That the plaintiff corporation has no adequate remedy at law; that if the Tax Commission, the Secretary of State, Auditor of State or Treasurer of State or any of them do or attempt to do the things hereinabove set forth, plaintiff corporation and its business will be irreparably damaged, for it cannot carry on in the State of Ohio its lawful operations as it has already been authorized to do; that this suit will prevent a multiplicity of suits being brought by the plaintiff corporation and others;

That unless the Tax Commission of the State of Ohio, the Secretary of State, the Auditor of State, and the Treasurer of State are enjoined, they and each of them will take the steps hereinabove set forth which is prescribed by law should be taken by them, and they and each of them threaten that unless enjoined they will follow out the provisions of the statutes of the State of Ohio prescribing their duties, if the plaintiff company does not pay the illegal and unconstitutional tax hereinabove set forth, all of which would be to the irreparable damage of the plaintiff.

Wherefore, plaintiff prays that the Tax Commission, the Auditor [fol. 13] of State and the Treasurer of State, and each of them, may be mandatorily ordered and enjoined to correct the computation of the tax under Section 5503 according to the terms and provisions of said section, unless this court find that Section 5503 of the General Code of the State of Ohio be unconstitutional, in which event plaintiff prays the Tax Commission, the Auditor of State, the State Treasurer, and the Secretary of State may be temporarily enjoined and restrained from in any way enforcing or collecting any tax computed under said unconstitutional Section 5503 of the General Code of the State of Ohio.

Plaintiff further prays that if the court finds said tax was assessed and the bill rendered by the Tax Commission of the State of Ohio, by the Auditor of State and by the Secretary of the Treasury under Section 8728–11 of the General Code of the State of Ohio, that the said Tax Commission may be temporarily enjoined and restrained from in any way pressing the payment of said tax and from in any way certifying to the Secretary of State the non-payment of said tax, as said law is unconstitutional; that the Secretary of State may be temporarily enjoined and restrained from attempting to cancel or from cancelling the plaintiff's certificate of authority to do business in the State of Ohio.

Plaintiff further prays that the Treasurer of the State may be temporarily enjoined and restrained from in any way attempting to collect the tax which has been assessed under said Section 8728-11,

or from in any way certifying the non-payment of said tax to any of the State officials.

The plaintiff further prays that a preliminary injunction may issue, continuing in effect such temporary restraining order, and that upon final hearing herein such injunction may be made perpetual.

[fol. 14] Plaintiff further prays for any and all other and further relief to which it may be entitled in equity and good conscience.

Air-Way Electric Appliance Corporation, By Voorys, Sater, Seymour and Pease, Tracy, Chapman & Welles, Its Solicitors. L. Sater and N. A. Tracy, Of Counsel.

STATE OF OHIO,
Lucas County, ss:

Pratt E. Tracy, being first duly sworn, upon his oath says that he is president of the Air-Way Electric Appliance Corporation, the plaintiff filing the foregoing bill of complaint, and that the facts stated in said bill of complaint are true.

Pratt E. Tracy.

Sworn to before me and subscribed in my presence this 25th day of November, 1921.

Robert G. Day. Notary Public, Lucas County, Ohio. [Notarial Seal of Lucas County, Ohio.]

[fol. 14½] [File endorsement omitted.]

[fol. 15] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 193

[Title omitted]

WAIVER—Filed Nov. 29, 1921

Now come the undersigned and each of them and waive the issuance and service of summons herein, and each voluntarily enters his appearance herein.

R. W. Archer, State Treasurer; Joseph T. Tracy, Auditor of State; John R. Cassidy, C. E. Forney, & C. A. Horn, State Tax Commission; Harvey C. Smith, Secretary of State, By John G. Price, Atty. General, Solicitor for Defendants.

[File endorsement omitted.]

[fol. 16] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 193

[Title omitted]

STIPULATION—Filed Nov. 29, 1921

By agreement of the parties, it is hereby stipulated that the present status of the plaintiff herein shall be maintained during the pendency of this cause and until the decision thereof, and that said plaintiff shall not be subjected to any penalties, fines or forfeitures by reason of any default on its part in the payment of the taxes mentioned and described in the petition.

John G. Price, Atty. General; Ray Martin, Special Counsel, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 17] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

MOTION FOR INTERLOCUTORY INJUNCTION—Filed Dec. 3, 1921

Now comes the plaintiff and moves the court for the issuance of an interlocutory injunction herein, in accordance with the prayer of plaintiff's bill of complaint.

Voorys, Sater, Seymour & Pease and Tracy, Chapman & Welles, Solicitors for Plaintiff.

[fol. 17½] [File endorsement omitted.]

[fol. 18] DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

ANSWER IN EQUITY—Filed Dec. 3, 1921

The defendants admit their official capacity as stated in the plaintiff's bill herein, except that Daniel J. Ryan is not now a member of said tax commission, having been succeeded by C. A. Horn; it is further admitted that the plaintiff was organized under the

laws of the State of Delaware, with its principle office in said state in the City of Wilmington; that the plaintiff is engaged in the business of manufacturing the articles stated in its complaint and that all of its property is located in the City of Toledo, Lucas County, Ohio; that it has an authorized capital stock of the amount and kind stated in said complaint; that said plaintiff was incorporated July 23, 1920, and shortly thereafter applied for admission to do business as a corporation in the State of Ohio under sections 178 et seq., General Code of Ohio, and paid the required fee therefor and complied with sections 181 et seq., General Code of Ohio, as further alleged in the plaintiff's bill.

[fol. 19] It is further admitted that the plaintiff complied with what is known as the Blue Sky Law of the State of Ohio as alleged in its complaint and on July 30, 1921, did file a report with the Tax Commission of Ohio as further stated therein; that the plaintiff claiming a mistake had been made in its tax bill called the alleged mistake to the attention of the tax commission and the attorney general of Ohio, which officers insisted that the tax as assessed must be paid.

Defendants further admit that by act of the securities department under the said so-called Blue Sky Law and upon the application of the plaintiff, the price at which said plaintiff was permitted to offer its stock for sale in the State of Ohio was seven dollars ($7.00) per share and that the plaintiff's statement in its complaint that the actual value of said stock is seven dollars ($7.00) per share is true.

For want of knowledge the defendants deny each and every other allegation contained in said bill except those herein specifically admitted to be true and say the same are untrue.

Answering further said defendants say that the tax involved in this case is the annual franchise tax imposed by the State of Ohio upon foreign corporations doing business within the state under and by virtue of sections 5503 and 8728-11, General Code of Ohio; that the act of which section 5503 is a part was passed in substantially the same form in 1902 in 95 Ohio Laws 124. This section imposed a tax upon such foreign corporations doing business in Ohio upon the proportion of its authorized capital stock represented by property owned and used and business done in the State of Ohio, and was in full force and effect at the time said plaintiff applied for permission to do business in the State of Ohio.

Said act was passed at a time when the no-par value common stock was not authorized or permitted in said state and was not in common use in corporate business.

[fol. 20] In 1919 the Ohio no par value stock law was passed in 108 O. L., Part I, 507, permitting the organization or reorganization of domestic corporations with common stock having no par value.

Defendants further say that from the beginning of Ohio's taxation of corporate privileges and franchises in the year 1902 the bases of the taxation of domestic and foreign corporations have been the tax on domestic corporations has been upon its outstanding capital

stock with no reduction representing property owned and used or business done outside of the state, and on foreign corporations on the proportion of its authorized capital stock represented by property owned and used and business done within the State of Ohio, with the exception of an amendment to section 8728-11 at a time not now involved. The section under which the present tax is assessed and referred to and quoted by the plaintiff uses the same bases as that contained in the original Ohio franchise tax, and such distinction is and has been in effect at all effective dates so far as this plaintiff is concerned for the past nineteen years.

In its application for permission to do business in the state of Ohio under section 178 et seq., General Code of Ohio, and in its report for the payment of the initial franchise fee under section 181, General Code of Ohio, said plaintiff in its sworn statement of its business stated that all of its property was to be owned and used and its business transacted in the state of Ohio.

In its report to the Tax Commission of Ohio as a foreign corporation for the year 1921 the plaintiff under oath stated that its principle place of business was in Toledo, Ohio, and that all of its property was owned and used and all its business transacted in Ohio.

The defendants disclaim any intention to, and deny that the law requires them to impose any tax upon any interstate business which the plaintiff may have, or to impose any tax as a condition upon its right to transact interstate business or to tax any of the property of the plaintiff outside of the state of Ohio.

[fol. 21] The defendants further say that section 8728-11, General Code of Ohio, though fixing the fee of domestic corporations upon its subscribed or issued and outstanding capital stock, fixes such fee upon such stock without reference to any proportion of its stock represented by property owned and used and business transacted outside of the state of Ohio, so that no reduction is made in favor of domestic corporations for stock represented by property outside of the state of Ohio.

Said defendants further say that the tax imposed in these laws is a franchise tax authorized by Section 10 of Article XII of the Constitution of Ohio adopted in 1912 and that such tax is not subject to the rule of uniformity and true value in money provided as to property taxes by Section 2 of Article XII of the Constitution of Ohio.

Said defendants further deny that said law denies to the plaintiff equal protection of law or deprives it of its property without due process of law or that the enforcement of the law will in any way cause said plaintiff to decrease or abandon its interstate business, and further say that said plaintiff has an adequate remedy at law.

John G. Price, Attorney General; Ray Martin, John M. Parks, Special Counsel, Solicitors for Defendants.

[fol. 21½] [File endorsement omitted.]

[fol. 22] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

AMENDMENT TO BILL OF COMPLAINT—Filed Dec. 9, 1921

Now comes the Air-Way Electric Appliance Corporation and for its amendment to the bill of complaint heretofore filed herein says that said sections of the General Code of Ohio mentioned in said bill of complaint, to wit, Sections 5503 and 8728-11 are unconstitutional, as being an attempt upon the part of the State of Ohio to regulate commerce among the several states and places a burden upon interstate commerce, and is an interference therewith, all of which is contrary to the provisions of Article 1, Section 8, Paragraphs 1 and 3, of the Constitution of the United States of America.

Plaintiff further says that a major portion of its business is business done in interstate commerce; that it has on the road many agents who travel all over the United States soliciting and obtain-
[fol. 23] ing dealers and orders; that said agents take said orders where they can be obtained, mail same to plaintiff in the City of Toledo, Ohio, where the orders are passed upon as to whether the goods shall be sold to the particular persons. Payments are made direct from the dealers wherever located by mail to plaintiff corporation.

Plaintiff further says that it ships its product to distributors, dealers and jobbers throughout the United States upon orders as received by it and also ships a large amount of its product to warehouses in various localities outside of the State of Ohio in its own name, from which warehouse stock its acknowledged dealers and jobbers may draw upon paying for same.

Plaintiff further says that it was required on or before the 31st day of July, 1921, to file with the Tax Commission of the State of Ohio a report; that Plaintiff did file said report; that the law in force and effect at the time said report was filed was 8728-11, 108 Ohio Laws, Part 2; that Section 8728-11, 109 Ohio Laws, page 273, was not in effect until August 14, 1921, or a date later than the date upon which plaintiff was required to file its report. Other sections of the General Code of the State of Ohio provide that said tax should be a lien in the amount ascertained upon the property of plaintiff corporation as of the 31st day of July, 1921; that said section of the law, to wit, 8728-11, 109 Ohio Laws, 273, is unconstitutional and void under the Ohio Constitution in that it is a retroactive law and the effect thereof is retroactive; that the acts of the defendants herein named, taken pursuant to said section were retroactive and illegal.
[fol. 24] Wherefore plaintiff prays as set forth in its bill of complaint heretofore filed herein.

Air-Way Electric Appliance Corporation, By Voorys, Sater, Seymour & Pease, Tracy, Chapman & Welles, Its Solicitors.
L. Sater & N. A. Tracy, of Counsel.

Pratt E. Tracy, being first duly sworn, deposes and says that the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware; that he is President thereof; that he has read the allegations of the foregoing amendment to the bill of complaint and that the same are true.

Pratt E. Tracy.

Sworn to before me and subscribed in my presence this 7th day of December, 1921. Seavey E. C. Moor, Notary Public, Lucas County, Ohio. Notarial Seal, Lucas County, Ohio.

[fol. 24½] [File endorsement omitted.]

[fol. 25] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

ANSWER TO THE AMENDMENT TO BILL OF COMPLAINT—Filed Dec. 13, 1921

Now come the above named defendants and for answer to the amendment to the bill of complaint herein, say that sections 5503 and 8728-11 are not unconstitutional as being in conflict with the provisions of paragraphs 1 and 3 of section 8, Article I of the Constitution of the United States, as alleged in said amendment.

Said defendants further deny that a major portion of the plaintiff's business is business done in interstate commerce and that said plaintiff was so engaged in interstate commerce on July 31, 1921, October 1, 1921, or during the month of October, 1921; that said defendants have no definite knowledge as to the number of agents which the plaintiff employs or the manner of their prosecution of the plaintiff's business, and cannot therefore specifically affirm or deny the plaintiff's allegations in its said amendment in this regard. [fol. 26] Said defendants are not advised and have no knowledge as to whether or not the plaintiff ships its product to distributors, dealers and jobbers throughout the United States upon orders received by it and also ships a large amount of its product to its warehouses and various localities outside of the state of Ohio in its own name, from which warehouse stock its acknowledged dealers and jobbers may draw upon and pay for the same, and for want of such information said defendants cannot specifically deny or affirm said plaintiff's allegations in this regard in said amendment. Said defendants are advised and informed, and therefore aver as a fact, that the plaintiff has a great many selling and distributing agents throughout the State of Ohio, especially in most if not all of the cities of said State of Ohio.

Said defendants admit that the plaintiff was required to and did file a report with the tax commission of Ohio on or before the 31st

day of July, 1921, at which time section 8728-11, as amended in 109 O. L., p. 273, was not in force but which became effective on August 14, 1921.

On the 31st day of July section 8728-11, as enacted in 108 O. L., Part 2, pp. 1287, 1293, was effective. Said defendants deny that said section, as last amended in 109 O. L., 273, 277, is unconstitutional and void under the Ohio Constitution, in that it is retroactive in form or effect and that the acts of the defendants thereunder were retroactive and illegal.

Answering further said defendants say that the amendment of said section 8728-11, enacted in 108 O. L., Part 2, 1287, 1293, was less favorable to foreign corporations than the last amendment under which said tax was assessed and levied, in this that former section 8728-11 imposed or attempted to impose the tax involved herein on all of the authorized common stock, without par value, without reference to any proportion thereof represented by property owned [fol. 27] and business transacted outside of the state of Ohio, and if not unconstitutional, was more onerous and exacting of foreign corporations because of making no allowance or exemption from the tax for its authorized stock represented by property owned and used and business transacted outside of the state.

Said defendants further say that said law is not retroactive in the sense contemplated in section 28, Article II, of the Constitution of Ohio in this, that the law in effect at the time of the levy or application of the existing rate is made, governs the tax payer and the official required to charge and collect the tax; that the law fixing the duties of the Tax Commission in force at the time of the action thereon by the tax commission in determining the existence, ownership, quality and value of the thing to be taxed, obtains and governs the tax commission under the law referred to in the plaintiff's complaint; and that the act of the tax commission of Ohio in this case, under section 5502, General Code of Ohio, was that on the first Monday of September, 1921, when it determined the proportion of the authorized capital stock of the plaintiff represented by its property owned and used and business done in the state of Ohio, from the facts stated in the report filed with it by the plaintiff, and as required by said section; that on the first Monday of October, 1921, said commission did certify the amount of such proportion to the auditor of state. It was not the duty of said commission to apply the rate or compute the amount of the tax. Upon receipt of such certification, and before October 15, 1921, the auditor of state applied, and was under the law obliged to apply and did apply the then existing rate as provided by law in section 8728-11, as amended in 109 O. L., 273, 277, which had become effective on the 14th day of the previous August, and said auditor was not obliged to and could not [fol. 28] apply the rate of the section, the repeal of which had also become effective August 14, 1921.

Defendants further say that section 5506, as amended in 109 O. L., 94, and effective on or about July 25, 1921, provided that the fees required under section 5503 became a lien on all of the property of the tax payer on the last day of the month fixed for filing of its

report, and said section was and is merely for the purpose of providing that such taxes as are levied and charged, as provided by other laws, shall become a lien and did not attempt to fix the amount of such taxes.

Said defendants further say that the theory of the state's lien for taxes attaching before the amount of the tax, either as to valuation or as to the rate of taxation, is known or ascertained, has long been the practice and theory in the state of Ohio, and amended section 8728-11, as found in 109 O. L., 273, 277, and as applied by the defendants in this case, was and is not retroactive and the proportion of the plaintiff's authorized capital stock represented by its property owned and used, and business done in the state of Ohio, was determined by the tax commission of Ohio after August 14, 1921, and the rate of franchise taxes and the method of application of such rate was made and used by the defendant auditor of state after August 14, 1921, and both such determination and charge by said defendants were made under the law then in force.

John G. Price, Attorney General. Ray Martin, Special Counsel. John M. Parks, Special Counsel.

[fol. 28½] [File Endorsement omitted.]

[fol. 29] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

[Title omitted]

AMENDMENT AND SUPPLEMENT TO BILL OF COMPLAINT—Filed Apr. 6, 1922

Now comes Air-Way Electric Appliance Corporation and for its amendment and supplement to the bill of complaint heretofore filed herein, says that pursuant to the suggestion made in the opinion of the Court heretofore rendered herein, it did, without prejudice to any of its existing rights, file with the Tax Commission of the State of Ohio, at its Offices in Columbus, Ohio, on or about the 27th day of February, 1922 a certain application addressed to said Commission for an order allowing plaintiff to amend the return filed with said Commission on or about July 31, 1921 and requesting said Commission to refigure the tax according to the figures set forth in said application; a copy of which application is hereto attached, made a part hereof and marked "Exhibit A".

Said application recited that plaintiff made an error and and mistake in answering question Number 19 by reporting that the business transacted in Ohio during the previous eleven months was. Sales, $250,594.58, when as a matter of fact, that figure represented all of [fol. 30] the business done by the corporation, whether transacted in or outside of the State of Ohio, and said application further stated that the correct answer to question No. 19 should have been $70, 802.30.

Said application further set forth that an error and mistake was made in answering question No. 23 on said return in answer to the question as to the amount of business transacted outside of Ohio during the proceeding twelve months. The answer given was "All handled from Ohio." The answer which should have been given was $179,792.28.

Said application also shows that by reason of the foregoing mistakes made on the return, the total of amounts opposite questions No. 18 and No. 19 was incorrect in that it was set forth as dollars, 708,518.56, when the total should have been $528,880.86.

On March 6, 1922 the Tax Commission of the State of Ohio entered the following order upon the application submitted:

"March 6, 1922.

"Mr. Forney submitted the following order and moved its adoption:

'In the matter of the application of the Air-Way Electric Appliance Corporation for permission to amend its franchise tax return for 1921 and for a review of the finding and certification of the Commission thereon.'

"This 6th day of March, 1922 the application of the Air-Way Electric Appliance Corporation, heretofore filed on the 27th day of February, 1922, asking for permission to amend its return for the purpose of the franchise tax for the year 1921, and asking that the Commission refigure the tax on such report as amended, came on for hearing by the Commission, and it appearing that heretofore, to-wit, on the third day of October, 1921, the Commission having previously determined the same certified to the Auditor of State in the manner required by law the proportion of the authorized stock of said company represented by property owned and used and business transacted in Ohio, and that no application to review the determination and finding of the Commission or its certificate to such Auditor was filed within sixty days after such certification was made, the Com- [fol. 31] mission thereupon refused to entertain the application of February 27th, 1922, and ordered that the same be, and it is hereby dismissed.

"It is further ordered that this entry be sent by registered mail, to the Air-Way Electric Appliance Corporation.

"The vote upon this motion resulted: Mr. Cassidy, aye; Mr. Horn, aye; Mr. Forney, aye.

"I hereby certify the foregoing to be a true and correct copy of the order of the Tax Commission of Ohio, this day made, with respect to the above matter.

(Signed) F. M. Butler, Secretary."

That the action of the Commission was unfair and unequitable and not taken in an effort to see that justice was performed between the parties hereto; all of which negatives the claim that they had no intention of placing a burden upon interstate commerce, and re-

sulted in placing a burden upon interstate commerce as prohibited by Section 8 of Article 1 of the Constitution of the United States of America.

That because of the failure of said Commission to grant said application and in the spirit of fairness determine the amount of plaintiff's stock represented by property owned and business done outside of the State of Ohio, and to refigure the tax as requested in said application, the plaintiff has been greatly and irreparably damaged and has no adequate remedy at law.

That the action of the Commission affirms the original fee as billed at Twenty Thousand Dollars ($20,000.00). That the tax of Twenty Thousand Dollars ($20,000.00) is to a certain extent imposed upon business done in interstate commerce. That the law under which said fee was charged is unconstitutional, as set forth in the bill of complaint in that there is an arbitrary classification and discrimina-
[fol. 32] tion between foreign and domestic corporations. Were this corporation an Ohio corporation the tax would be:

Issued stock, 50,485, $2,524.25.
As it is a foreign corporation the tax is:
Authorized stock, 400,000, $20,000.00.

Wherefore, plaintiff prays as prayed for in its original and amendment to the bill of complaint heretofore filed herein, and for a mandatory order of this Court against the Tax Commission of the State of Ohio, requiring said Commission to vacate and set aside the order entered on March 6, 1922 and to allow plaintiff to amend its return, to determine the amount of business done by plaintiff in interstate commerce, and to refigure the tax in accordance therewith, or that all of the defendants be enjoined permanently from in any way endeavoring to collect that part of the tax assessed which amounts to an interference with interstate commerce and for such other relief as the Court may deem equitable.

Voorys, Sater, Seymour & Pease; Tracy, Chapman & Welles, Attorneys for Plaintiff. Newton A. Tracy, of Counsel.

STATE OF OHIO,
Lucas County, ss:

Pratt E. Tracy, being first duly sworn, says that he is President of Air-Way Electric Appliance Corporation, a corporation organized under the laws of the State of Delaware; that he has read the foregoing Amendment and Supplement to Bill of Complaint, and that the facts contained therein are true.

Pratt E. Tracy.

Sworn to before me and subscribed in my presence this 4th day of April, 1922. B. H. David, Notary Public, Lucas County, Ohio. [Notarial Seal, Lucas County, Ohio.]

[fol. 33] EXHIBIT A TO AMENDMENT AND SUPPLEMENTAL BILL OF COMPLAINT

BEFORE THE TAX COMMISSION OF THE STATE OF OHIO

In re Franchise Fee of AIR-WAY ELECTRIC APPLIANCE CORPORATION

Application

Now comes the Air-Way Electric Appliance Corporation and represents that it is a Delaware corporation authorized to do business in the State of Ohio; that it is engaged in the business of manufacturing and selling electric vacuum cleaners, automobile cleaners, electric washing machines, small motors and bell ringing transformers, and its manufacturing plants and main offices are located in the City of Toledo, Lucas County, Ohio; that on or about July 31st, 1921 it made a report to the Tax Commission of the State of Ohio, as required by law, on a blank furnished therefor by said Commission; that said report as filled out shows in answer to question 16, the true or actual value of the property owned and used in Ohio as being $458,278.56, the assessed value at $213,240.00.

The answer to question 18 shows the total value of the property owned and used by the company in the State of Ohio as $458,278.56; in answer to question 19 the amount of business transacted in Ohio during the preceding eleven months was, as shown by the report—Sales, $250,594.58.

The answer to question No. 23 on the report, the amount of business transacted outside of Ohio during the preceding twelve months was $—, "all handled from Ohio."

[fol. 34] Your applicant made a mistake in answering question No. 19 and in answering question No. 23, as appears on the report, in that of the $250,594.58 Sales, $179,792.28 Sales was represented "Sales Made in Interstate Commerce," and $70,802.30 of that amount represented "Business transacted in the State of Ohio." Therefore the answer to question No. 19 should have been $70,802.30, and the sum of items 18 and 19 should have been $528,880.86. The answer to question No. 23 should have been $179,792.28.

The Air-Way Electric Appliance Corporation during the month of November, 1921 instituted suit against R. W. Archer, Treasurer of State, Joseph T. Tracy, Auditor, John R. Cassidy, C. E. Forney, Daniel J. Ryan, as the Tax Commission, and Harvey C. Smith, Secretary of State, for the purpose of restraining the collection of said tax. The Court on Saturday, February 18th, rendered its opinion in said cause, which said opinion sets forth:

"We feel that a determination of the proportion of plaintiff's property owned and used and business done inside and outside of Ohio is a proper subject of inquiry absolutely essential to the determination of the question, whether any part of the tax is levied upon the proportion of its authorized stock, if any, represented by property owned and used and business transacted beyond the State. * * *

Whether the action of plaintiff after it was notified of the assessment made against it rose to the dignity of a request or demand for a rehearing before the Commission and whether that body if a request for a rehearing yet be made will conclude that the request is not timely, or out of a desire to be accurate and just will grant a rehearing regardless of the lapse of time, are questions for the Commission to decide."

Without prejudice to any of our existing rights we do now request the Commission for permission to amend our return in the particulars hereinabove set forth, and further request the Commission to re-[fol. 35] figure the tax, using the report as amended as the basis for its calculation of the tax, which we submit should be arrived at in the following manner:

By using the total value of the property owned and used by the Company in the State of Ohio as $458,278.56, the amount of business transacted in the State of Ohio, $70,802.30, the amount of business transacted outside of the State of Ohio, $179,792.28, and find the proportion between the value of the property owned and used and business transacted in the State of Ohio as to that business transacted outside of the State of Ohio, and then compute the tax upon the porportionate number of shares which represents the property owned and business done within the State.

Tracy, Chapman & Welles, Attorneys for Air-Way Electric Appliance Corporation.

STATE OF OHIO,
Lucas County, ss:

L. G. Pierce, being first duly sworn, deposes and says that he is Treasurer of the Air-Way Electric Appliance Corporation; that he has read the facts in the foregoing application and that the same are true as he verily believes.

L. G. Pierce.

Sworn to before me and subscribed in my presence this 27 day of February, 1922.

Seavey E. C. Moor, Notary Public, Lucas County, Ohio.

Filing and attachment to amendment & supplement to petition consented to June 28, 1922.

Ray Morton, Of Counsel.

[fol. 35*a*] [File endorsement omitted.]

[fol. 35*b*] [File endorsement omitted.]

[fol. 36] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

ANSWER OF THE TAX COMMISSION OF OHIO TO THE PLAINTIFF'S AMENDMENT AND SUPPLEMENT TO BILL OF COMPLAINT—Filed Apr. 28, 1922.

Now come the defendants S. E. Forney, John R. Cassidy and C. A. Horn, constituting the Tax Commission of the State of Ohio, and for their answer to the plaintiff's amendment and supplement to its bill of complaint herein say that they admit that the plaintiff filed with said Tax Commission, at its office in Columbus, Ohio, on or about the 27th day of February, 1922, a certain application addressed to said Commission, for an order allowing said plaintiff to amend its return filed with said Commission on or about July 31, 1921, and requesting said Commission to refigure the taxes according to the figures set forth in said application, a copy of which said application was attached to and made a part of said plaintiff's amended and supplemented bill of complaint.

It is further admitted that on March 6, 1922, the said Commission made and entered the order referred to in said amendment and supplement as stated therein.

[fol. 37] Said defendants deny each and all of the other allegations of said amended and supplemented bill of complaint in this, that the action of said Commission in making said order was not unfair and unequitable and was made with no intention of placing any burden upon interstate commerce or to injure the plaintiff, but said application was rejected and not entertained by said Commission for the reason that it had long been previously advised by its legal adviser, the Attorney General of Ohio, that after said Commission had determined the proportion of the authorized stock of the plaintiff represented by property owned and used and business transacted in Ohio, and had certified such determination and finding to the State Auditor, and the tax on said stock so determined had been charged by said Auditor for collection and more than sixty days had elapsed after such determination and certification and charging for collection without any application for review or application to amend having been filed, said Commission had exhausted its authority and had no power or jurisdiction to entertain such an application as filed by the plaintiff herein. The act of said Commission in rejecting said application, as aforesaid, was in conformity to the laws of the state of Ohio and the established practice of the Tax Commission of Ohio, as constituted by these answering defendants and their predecessors in office.

Defendants further say that the plaintiff's negligence in the matter of its reports and its subsequent laches in connection therewith have caused whatever hardships could possibly result if the facts support the conclusions contained in said application. But notwithstanding

this said plaintiff is not without recourse in this: Under section 5524 of the General Code of Ohio, the Attorney General is empowered and authorized to compromise and adjust the state's claim for taxes with the advice and consent of said Tax Commission, when, as in this case, the claim has been certified from the State Treasurer for collection.

[fol. 38] By virtue of these provisions in the Ohio law, and in view of the situation thus caused by the plaintiff's negligence, these answering defendants could not legally entertain or grant the plaintiff's application, but in view of section 5524, above referred to, if and when said plaintiff desires to pay said taxes, the facts as to the plaintiff's engagement in interstate commerce, the mere conclusion as to which is stated in said application, may be considered as the basis of a compromise to the end that the amount of taxes which said plaintiff will actually be obliged to pay will exclude any taxes based upon any proportion of stock represented by property owned and used and business done in interstate commerce, or outside of the state of Ohio. Said plaintiff knows and has been advised of such procedure in the compromise of delinquent taxes.

By way of further defense to the charge or implication of disregard for the equities involved in said plaintiff's application, these defendants further say that by the provisions of section 5623 of the General Code of Ohio, said Tax Commission is required to decide all questions that arise with reference to the construction of the Ohio statutes affecting the assessment levy and collection of taxes in accordance with the advice and opinion of the Attorney General of Ohio, unless and until such advice and opinion is reversed, annulled or modified by a court of competent jurisdiction, and that their action in refusing to entertain and grant the application of this defendant was not made in a spirit of unfairness, as charged or intimated in said amendment and supplemented complaint that the facts in relation to said application are insufficient in law to further maintain or longer continue said plaintiff's alleged cause of action herein.

John G. Price, Attorney General; John M. Parks, Special Counsel; Ray Martin, Special Counsel, Solicitors for Defendants.

[fol. 38½] [File endorsement omitted.]

[fol. 39] In the District Court of the United States for the Southern District of Ohio, Eastern Division

[Title omitted]

Affidavit of Harry Haudenschild—Filed Feb. 11, 1922

Harry Haudenschild, being first duly sworn, deposes and says that he is a resident of the City of Toledo, Lucas County, Ohio, and Vice-President of the Air-Way Electric Appliance Corporation; that the

major portion of the products manufactured by the Air-Way Electric Appliance Corporation, to-wit, vacuum cleaners, electric washing machines, small motors, bell-ringing transformers, etc., are sold in interstate commerce among its dealers and jobbers in various parts of the United States, for use in the United States and in foreign countries; that outside of the state of Ohio the plaintiff corporation has one hundred ten (110) jobbers who handle its product and sell to retail dealers and to the retail trade; that it has one jobber in New York City, New York, who sends orders to the factory in Ohio for products to be shipped to foreign countries, and upon orders of this nature payment is made by the Jobber by check or draft when the goods are presented at the steamship wharf, said checks or drafts [fol. 40] being mailed directly to the plaintiff at Toledo, Ohio; that besides the jobbers hereinabove mentioned the Air-Way Electric Appliance Corporation has one hundred eighty-three (183) dealers located within the United States but outside of the State of Ohio; that the jobbers and dealers hereinabove mentioned are solicited by four salesmen traveling outside of the State of Ohio on salary and commission and one salesman traveling part of the time outside of the State of Ohio upon commission; that the orders sent in either directly from the dealers, jobbers or salesmen come by mail or telegraph from their respective sources to the offices of the company at Toledo, Ohio, where the product is packed and shipped in interstate commerce to the respective persons ordering the same; that the goods are usually sent sight draft, bill of lading attached or to accredited accounts where the recipients thereof pay by check shortly after the receipt of the goods; that all the bookkeeping of the company is done in the offices of the company at Toledo, Ohio.

Deponent further says that at various times it ships to warehousemen outside of the State of Ohio considerable of its product to be warehoused until such time as the dealers in the particular territory draw upon the same and give their check to the warehousemen in payment of the goods.

Deponent further says that the business of the company during the time for which the report was filed with the Tax Commission of the State of Ohio amounted in dollars and cents to Two Hundred Fifty Thousand Five Hundred Ninety-Four and 58/100 Dollars ($250,594.58); that of this amount of business done and product shipped One Hundred Seventy-Nine Thousand Seven Hundred Ninety-Two and 28/100 Dollars ($179,792.28) represents the product [fol. 41] of the company hold outside of the State of Ohio; that Seventy Thousand Eight Hundred and Two and 30/100 Dollars ($70,602.30) represents the amount of property sold within that same time in the State of Ohio. Deponent further says that on the amount of business done during said eleven months' period the company did not make a profit but lost considerable money.

Further deponent saith not.

H. Haudenschild.

Sworn to before me and subscribed in my presence, this 20th day of December, 1921. Seavy E. C. Moors, Notary Public, Lucas County, Ohio. [Notarial Seal of Lucas County, Ohio.]

[fol. 41½] [File endorsement omitted.]

[fol. 42] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

AFFIDAVIT OF LAWRENCE G. PIERCE—Filed Feb. 11, 1922

STATE OF OHIO,
Lucas County, ss:

Lawrence G. Pierce, being first duly sworn, deposes and says that he is Secretary and Treasurer of the Air-Way Electric Appliance Corporation, a Delaware corporation duly authorized to transact and carry on business in the State of Ohio; that of the 400,000 authorized shares of capital stock of said corporation but 2,242 shares of the common stock are subscribed for, paid, issued or outstanding; that but 48,035 shares of founders' stock of said corporation are paid, subscribed for, issued or outstanding;

That the assets of said corporation over and above the liabilities, all of which assets are located in the State of Ohio, are worth $588,866.56;

That the property of plaintiff corporation located in the State of Ohio consists of two large plants, one of which is located on Broadway Street, Toledo, Ohio, and is of the following size and dimensions: 60 ft. x 100 ft. three floors high. This plant was especially built by one of plaintiff company's predecessors for the purpose of [fol. 43] manufacturing small electric motors, bell ringing transformers and other electric appliances. Said plant is at the present time well equipped for said purposes and is especially adapted for the uses for which it was built. The books of the company show in the following manner the value of the grounds, buildings, machinery, etc.:

Grounds	$9,500.00
Building and building fixtures	130,728.73
Machinery and machine tools	90,343.78
Small tools and dies	28,290.91
Patterns and drawings	3,338.60
Equipment and transformer department	26.64
Warehouse building	84.27
Furniture and fixtures	4,361.19
Total	$266,674.12
Less Depreciation	16,189.28

The other plant of the plaintiff corporation is situated upon Auburn Avenue in the City of Toledo and is of the following dimensions: Approximately 75 ft. x 250 ft. with grounds which are approximately 400 ft. x 300 ft., which said building is two stories high. That this property is used by the plaintiff corporation for the manufacture of electric washing machines and vacuum cleaners and other electric household appliances; that the books of the company show the value of this particular property and the equipment in said plant in the following manner:

Grounds	$20,000.00
Buildings	92,530.88
Fencing, paving and railroad sidings, etc.	3,577.94
Machinery	60,534.88
Patterns	2,713.09
Tools and dies	26,319.58
Tools and dies at contractors	5,652.00
Factory fixtures	8,122.03
Office fixtures	4,566.25
Auto truck	654.85
Total	$218,671.50
Less Depreciation	13,070.62

[fol. 44] That the raw materials on hand in both of said plants which said materials are used in manufacturing the various products of the plaintiff corporation are shown by the books of the company to be worth $224,428.00. The finished product on hand amounts to $50,182.83. Materials in process amount to $49,492.65.

Deponent further says that both of said plants are owned by the plaintiff corporation in fee; that both plants are very well equipped for the purposes for which they are used and adaptable to no other purposes without spending a large sum of money in changing machinery, tools, fixtures, etc. That were either one of said plants placed upon market at this time, during this period of financial depression, or at any other time within the next two or three years, the plaintiff corporation could not realize anywhere near the value hereinabove set forth, which deponent avers is the fair and reasonable value at the present time.

Deponent further says that ordinarily they employ in the manufacture of the products of the plaintiff corporation from 200 to 500 workmen and artisans.

That said corporation has paid all taxes, license fees and franchise fees due the State of Ohio, County of Lucas or City of Toledo, with the exception of the $20,000.00 franchise fee involved in this litigation.

Further affiant saith not.

Lawrence G. Pierce.

Sworn to before me and subscribed in my presence this 2nd day of December, 1921. Seavey E. C. Moor, Notary Public, Lucas County, Ohio. (Notarial Seal of Lucas County, Ohio.)

[File endorsement omitted.]

[fol. 45] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

AFFIDAVIT OF LAWRENCE G. PIERCE—Filed Sept. 30, 1922

Lawrence G. Pierce, being first duly sworn, deposes and says that he is a resident of the City of Toledo, Lucas County, Ohio, and Secretary and Treasurer of the Air-Way Electric Appliance Corporation, a Delaware corporation with its principal office and place of doing business in the City of Toledo, Lucas County, Ohio.

That said corporation did at all times mentioned between the dates of August 1, 1920, and July 21, 1921, and does now own and operate two separate factories in the City of Toledo. That in one of said factories it manufactures small electric motors and bell-ringing transformers; that in the other of its factories it manufactures Air-Way Electric Vacuum Cleaners and Air-Way Washing Machines, all of which said products are made for sale throughout the State of Ohio, the United States and in foreign countries.

That during the times hereinabove specified the corporation had [fol. 46] four salesmen traveling entirely outside of the State of Ohio on salary and commission, which said salesmen solicited business in their respective territories, so that practically every state in the Union was canvassed for the sale of its various products. That at all times hereinabove specified the corporation had one salesman on commission and salary who traveled part of the time in the State of Ohio and part of the time outside of the State of Ohio in an effort to sell the corporation's product.

That the corporation also advertised in various mediums, both inside and outside of the State of Ohio, for jobbers and dealers to handle its said products.

That through the efforts of its traveling salesmen and its advertising, during the times hereinabove specified it secured one hundred ten jobbers, who handle its products and sell to retail dealers, all of which said jobbers and dealers are located outside of the State of Ohio. That besides the jobbers hereinbefore mentioned the corporation has through the efforts of its salesmen and through its advertising secured one hundred eighty-three dealers within the United States but outside of the State of Ohio.

That any and all orders received from said jobbers or dealers were either transmitted by mail to the corporation's office in Toledo, Ohio,

or brought by the salesmen from the various originating sources to the office of the Corporation in Toledo, Ohio, where all of said orders were subject to acceptance and approval by an officer of the corporation. That the corporation has one jobber in New York City, New York, who sends orders to the factory in Ohio for products to be [fol. 47] shipped to foreign countries. That the orders received from said jobber were always subject to acceptance by the corporation at its Toledo office. That some of the orders from the above mentioned jobbers and dealers located outside of the State of Ohio are received by telegraph and are subject to acceptance by an officer of the corporation at its Toledo office.

That after acceptance of any and all of the respective orders received in the manners above mentioned, the goods were manufactured or, if already manufactured, packed and shipped from the Toledo factories to the points of designation, either by express or freight; that said products were usually sent sight draft bill of lading attached or to accredited accounts where the recipients thereof paid by check shortly after the receipt of the goods. That all payments made by said dealers and jobbers outside of the State of Ohio were made by mail from their respective places to the office of the corporation at Toledo, where all of the bookkeeping of the company was carried on. Frequently the corporation has received orders from outside of the State of Ohio for some of its products, which it shipped to warehouses in states outside of Ohio, where they were held until such time as the dealers or jobbers in the particular territory drew upon the same and gave their checks to be forwarded to the Toledo office in payment of the goods.

That the value of the orders received, as hereinbefore set forth, and of the goods shipped as hereinbefore set forth, to the respective dealers, jobbers and warehouse men outside of the State of Ohio, all of which orders were received in the manners above specified, amounted to $179,792.28 during the period hereinabove mentioned. [fol. 48] That during the same period the corporation transacted and carried on business within the State of Ohio by selling its products therein, in the amount of $70,802.30.

Further deponent saith not.

Lawrence G. Pierce.

Sworn to before me this 23d day of June, 1922. Paul T. Phillips, Notary Public, Lucas County, Ohio. (Notarial Seal of Lucas County, Ohio.

[File endorsement omitted.]

[fol. 49] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

AFFIDAVIT OF NEWTON A. TRACY—Filed Feb. 11, 1922

STATE OF OHIO,
County of Lucas, ss:

Newton A. Tracy, being first duly sworn, deposes and says that he is an attorney-at-law practicing in the City of Toledo, Lucas County, Ohio, and is a member of the firm of Tracy, Chapman & Welles. That as soon as deponent became aware of the fact that the Treasurer of the State of Ohio had billed the Air-Way Electric Appliance Corporation for a franchise tax amounting to Twenty Thousand Dollars ($20,000.00), he immediately wrote the Treasurer of the State of Ohio and the Tax Commission of the State of Ohio, alleging that a mistake must have been made in the assessment of the tax, in that the amount was excessive and not authorized by law and by reason of the fact that the bill itself stated that the tax was assessed under Section 5503 of the General Code of the State of [fol. 50] Ohio; and he called the attention of both the Tax Commission and the Treasurer of the State of Ohio to the fact that no assessment under that particular section would amount to the computation made and finally billed to the corporation.

A reply was received from the Treasurer of State, stating that our letter had been turned over to the Tax Commission. The Tax Commission replied to both letters, stating that no mistake had been made in the computation of the tax and that the tax was assessed under Section 8728–11, even though the bill stated on its face that it was rendered under Section 5503.

That shortly after the receipt of the aforementioned letter deponent went to Columbus, where he interviewed Mr. Forney, Chairman of the Tax Commission, relative to the above-mentioned tax. At the conference between said Chairman of the Tax Commission and deponent, deponent stated that the major portion of the business of the Air-Way Corporation was business done in interstate commerce. Deponent thereupon related the facts as to the corporation's interstate business as he then knew them, and approximately in the same manner as now outlined in the evidence in this case; and stated that an amended bill should be rendered, based upon the fact that the company was engaged in interstate commerce. The Chairman of the Tax Commission replied, from the statements of facts as deponent had given them he was of the opinion that the business transacted by the defendant corporation was not interstate business and that therefore no reduction could be made in the tax. Mr. Forney then obtained a copy of the report of the corporation as filed July 31, 1921, which showed the amount of property owned and busi- [fol. 51] ness done in the state of Ohio. Opposite the question No. 23 on said report "The amount of business transacted outside of Ohio

Exhibit 1 to Tracy's Affidavit.

Exhibit 4

NO FEE LESS THAN $10.00 IN ANY CASE

STATE OF OHIO
DEPARTMENT OF
TREASURER OF STATE

No. 1407
COLUMBUS, OHIO,

As required by Section 5503, General Code, notice is hereby given that an annual Fee for the year 1921 is assessed against your company, as follows:

.....; proportion of authorized preferred stock represented by property owned and business transacted in Ohio, as per report to the Tax Commission, at 3/20 of 1%, $.....

400,000 shares of authorized common stock without par value represented by property and business in Ohio at 5c per share . . . . . $ 20,000.

Total fee . . . . . $ 20,000.

Must be PAID ON OR BEFORE DECEMBER 1, 1921, TO AVOID 15% PENALTY

THE Air Way Electric Appliance CO.
P. E. Tracy, Pres.,
Toledo, O.

52 1/2

NOTE: If receipt is desired, send this statement and stub with check. This statement will then be returned, properly receipted.

No 1407

1921 Foreign Corporation Fee Due on or Before December 1, 1921

$ 20,000.00

If NO RECEIPT is desired, return only this stub with remittance. Return of this stub is necessary for proper credit.

(Signed) R. W. ARCHER,
Treasurer of State.

V Exhibit 2 to Tracy's affidavit ~~Exhibit~~

1921

Annual Report of a Foreign Corporation

PRESERVE ONE COPY FOR REFERENCE

This Report must be filed with the Tax Commission of Ohio during the month of July

A corporation failing or neglecting to file its report within the time prescribed is subject to a penalty of ten dollars per day for each day's omission.

The annual fee charged for the privilege of exercising its franchises in this state, must be paid to the Treasurer of State on or before the first day of December. A corporation failing or neglecting to pay such fee, within the prescribed time, shall be subject to a penalty of fifteen per cent of the amount of the fee required to be paid by it.

N. B. All items called for in this Blank must be given in full.
Where possible report should be typewritten.

July 29, 1921., 1921.

To the Tax Commission of Ohio
Columbus, Ohio

The undersigned, a foreign corporation, for profit, in compliance with an act of the General Assembly of the State of Ohio, entitled, "An act to repeal sections 5446 to 5542-8, inclusive, and 5542-10 to 5542-24, inclusive, of the General Code, as enacted May 10, 1910, (101 Ohio L., 399), relating to the tax commission of Ohio and to further define its powers and duties," passed May 31, 1911, hereby makes the following report:

1. The name of the corporation is Air-Way Electric Appliance Corporation

2. It is organized under the laws of the State of Delaware or country

3. The location of its principal office is Toledo, County of Lucas, State of Ohio

4. The names of its President, Secretary, Treasurer and Members of the Board of Directors, with the postoffice address of each are as follows:

	NAME.	ADDRESS.
President	Pratt E. Tracy	Toledo, Ohio
Secretary	L.G.Pierce	" "
Treasurer	L.G.Pierce	" "
Board of Directors	Pratt E. Tracy	" "
	H.Haudenschild	" "
	L.G.Pierce	" "
	M.M.Miller	" "
	C.O.Miniger	" "
	Thos.H.Tracy, Sr.	" "
	Chas. E.Bunting	" "

5. The name and location of its office or offices in this state, and the name and address of the officers or agents of the corporation in charge of its business in this state are as follows:

NAME OF OFFICE OR AGENCY.	NAME OF OFFICER OR AGENT IN CHARGE OF ITS BUSINESS IN OHIO	P. O. ADDRESS OF OFFICER OR AGENT.
Air-Way Elec. App.Corp.	Pratt E.Tracy, Pres.	Toledo, Ohio

6. Officer to whom corrspondence concerning this report and notice for payment of fee should be addressed:

NAME.	TITLE.	ADDRESS.
Pratt E.Tracy	President	Toledo, Ohio

7. The date of the annual election of its officers is Jan. 11, 1921

22. The total value of the property owned and used by the company outside of Ohio is $ None

*23. The amount business transacted outside of Ohio during the preceding 12 months was $ All handled from Ohio

8. The amount of its authorized capital stock is - - - - - - Pfd. ~~xxx~~ Com. $ Founders 200,000 shares) all, no Common 200,000 ") par value

9. The number of the shares of its capital stock is - - - - - Pfd. ~~See above~~ Com.

10. The par value of each share of its capital stock is - - - - Pfd. $ None Com. $

11. The amount of its capital stock subscribed is - - - - - - Pfd. ~~xxx~~ $ Com. Founders 40,475 shares ~~xx 10,010 shares~~

12. The amount of its capital stock issued is - - - - Pfd. ~~Founders~~ $ ~~40,475~~ " Com. ~~xx 10,010~~ "

13. The amount of its capital stock paid up is - - - - Pfd. Founders $ ~~282,625.00~~ Com. $ ~~65,379.13~~

14. The nature and kind of business in which the company is engaged is

~~Manufacture and Sale Electric Motors and Household Electric Labor Saving~~ Devices.

15. The nature and kind of business transacted in Ohio is ~~Manufacturing and~~ ~~Selling~~

16. Value of Property owned and used in Ohio—separated by counties.

NAME OF COUNTY.	VALUE. True or Actual.	VALUE. As Assessed for Taxation.	NAME OF COUNTY.	VALUE. True or Actual.	VALUE. As Assessed for Taxation.
~~Lucas~~	$ ~~458,278.56~~	$ ~~213,240.00~~		$	$
	$	$		$	$
	$	$		$	$
	$	$		$	$
	$	$		$	$
	$	$		$	$
Total	$	$	Total	$	$

Grand Total $ ~~458,278.56~~ $ ~~213,240.00~~

17. Detailed statement of property in Ohio—kind and value.

Real Estate	Leases.	Personal Property, Material, Mdse., and Supplies.	Moneys, Credits and Investments.	Good Will, Patents, Trademarks and Other Intangible Values.	Other Personal Property.
$ ~~29,500.00~~	$ 0	$	$	$	$

18. The total value of the property owned and used by the company in the state of Ohio is $ ~~458,278.56~~ Started business Aug.1,1920 - 11 months

*19. The amount of business transacted in Ohio during the preceding ~~12~~ 11 months was Sales $ 250,594.58

Sum of Items 18 and 19 $ 708,873.14

20. Value of property owned and used outside of Ohio and where situated.

LOCATION. State or Country.	VALUE. True or Actual.	VALUE. As Assessed for Taxation.	LOCATION. State or Country.	VALUE. True or Actual.	VALUE. As Assessed for Taxation.
	$	$		$	$
	$	$		$	$
None	$	$		$	$
	$	$		$	$
	$	$		$	$
	$	$		$	$
Total	$	$	Total	$	$

Grand Total $ None $

21. Detailed statement of property outside of Ohio—kind and value:

Real Estate	Leases.	Personal Property, Material, Mdse., and Supplies.	Moneys, Credits and Investments.	Good Will, Patents, Trademarks and Other Intangible Values.	Other Personal Property.
$	$	$	$	$	$

*For the year ending June 30, 1921.

54

Founders 200,000 shares) all no

22. The total value of the property owned and used by the company outside of Ohio is.....$ None

*23. The amount business transacted outside of Ohio during the preceding 12 months was.....$ All handled from Ohio

24. The total value of all the property owned and used by the company is.....$ -
(The sum of items 18 and 22).

25. The total amount of business transacted by the company during the preceding 12 months was $ -
(The sum of items 19 and 23.)

Sum of items 24 and 25, $ -

26. The company qualified to do business in Ohio on 8th. day of November 1920
(month) (year)

27. The change or changes, in the above particulars (called for under items 8 to 23 inclusive) made since filing the last annual report, are as follows: This is 1st. report

Attached herewith is a true and correct list of the stockholders in this company residing in Ohio, showing the name, address and number of shares held by each.

*See Note Below. All our property is taxed in Ohio

IN WITNESS WHEREOF, Said corporation has caused its corporate seal to be hereto attached, and this report to be executed, by its Presidnt, this 30th day of July, 1921.

The Air Way Electric Appliance Corporation Company

[COMPANY'S SEAL]

By Pratt E. Tracy

STATE OF Ohio, COUNTY OF Lucas, ss.

Pratt E. Tracy being duly sworn, deposes and says that he is the President of the Air-Way Electric Appliance Corporation Company;

that he executed the foregoing report in the name of and on behalf of said corporation, and caused its corporate seal to be thereto affixed; that he was authorized to make said statement, and to execute the same, by authority of the corporation and further, such corporation has not during the preceding year, directly or indirectly, paid, used or offered, consented or agreed to pay or use, any of its money or property for, or in aid of, any political party, committee or organization, or for, or in aid of, any candidate for political office, or for nomination for any such office, or in any manner used any of its money or property for any political purpose whatever, or for the reimbursement or indemnification of any person or persons for moneys or property so used, and that he is an officer of said corporation, having knowledge of the facts herein set forth, and that the statements contained in said report and in this affidavit are true.

Pratt E. Tracy

(Officer of company verifying report sign here)

Sworn to before me and subscribed in my presence, this 30th. day of July, A. D. 1921.

Notary Public.

[NOTARIAL SEAL]

all

If at least two-thirds of the property of your company is taxed in Ohio and the remainder is taxed in another State or States of the United States and the company also pays a corporation fee to the State of Ohio for the privilege of exercising its franchises herein upon its full authorized capital stock, this list of stockholders need not be furnished.

Exhibit #3 to Tracy's affidavit Exhibit 3

Toledo, Ohio

September 10, 1920

TO THE SECRETARY OF STATE,
COLUMBUS, OHIO:

Air-Way Electric Appliance Corporation

a foreign corporation organized and existing under and by virtue of the laws of the state of Delaware,

with its principal office located at No. 7 W. 10th St., Wilmington, *in* New Castle *County,*

Delaware, *in compliance with Sections 183 and 184 of the General Code of the State of Ohio, passed February 14, 1910, approved February 15, 1910, requiring a foreign corporation organized for purposes of profit and owning or using, or which proposes to own or use, a part or all of its capital stock or plant in said State of Ohio, before being permitted to do business, exercise its franchises, or maintain an action therein, under the oath of its president, secretary or other officer, to make and file with the Secretary of State a statement of facts and pay a certain stipulated fee, hereby makes the following declaration:*

FIRST. The authorized capital stock of said corporation is 400,000 Shares Non Par Value *Dollars ($* None*), divided into* ( ) *Shares of the par value of* ( ) *Dollars ($*) *each.*

200,000 Shares of Founders Stock Non Par Value

200,000 Shares of Common Stock Non Par Value

SECOND. The value of the property owned and used in Ohio, situate at Toledo *is* 750,000 *Dollars ($* 750,000.00*).*

THIRD. The value of the property of the company owned and used outside of Ohio is Fifty *Dollars ($* 50.00 *).*

FOURTH. The proportion of the capital stock of the company represented by property owned and used and by business transacted in Ohio is Practically all

FIFTH. The location of its office or offices in Ohio is at Toledo (City or Town)
Auburn Ave., & 618 Broadway (Street Number)

SIXTH. The names and addresses of the officers or agents of the company in charge of its business in Ohio are as follows:

Name of President, Pratt E. Tracy
Address, Auburn Ave., Toledo, Ohio
Name of Secretary, Newton A. Tracy
Address, 1002 Ohio Bldg., Toledo, Ohio
Name of Treasurer, Lawrence Pierce
Address, Toledo, Ohio

Names and addresses of managers or agents, other than as above enumerated:

Vice President & General Manager
Harry Haudenschild Toledo, Ohio

Exhibit 4 to Tracy's affidavit ~~Exhibit 4~~

(ATTACH COPY OF ARTICLES OF INCORPORATION HERE)

TO THE SECRETARY OF STATE,
COLUMBUS, OHIO:

Air-Way Electric Appliance Corporation,

a corporation organized and existing under the laws of the State of Delaware, with its principal office located at Wilmington, in New Castle County, Delaware, desiring to conform to the laws of Ohio, regulating foreign corporations doing business therein, does hereby make the following statement:

FIRST. The amount of its authorized capital stock is 400,000 Shares Non Par Value

SECOND. The business or objects of the corporation which it is engaged in carrying on, or which it purposes to engage in or carry on in the State of Ohio is

Manufacturing and dealing in household electric appliances and parts thereof.

THIRD. The principal place of business of said corporation in Ohio is to be located at Toledo, 618 Broadway & (City or Town)
Auburn, Ave., in Lucas County
(Street Number)

FOURTH. We hereby appoint Pratt E. Tracy, of Toledo,
in Lucas County, Ohio, as the person upon whom process may be served in all actions that may be brought against this company in any of the courts of the State, and designate his office Auburn Ave~~nue~~ Broadway
in said city, as the principal office of the company in the State of Ohio.

IN WITNESS WHEREOF, Said corporation has caused its corporate seal to be hereto attached, and this certificate to be executed by its President and Secretary, this 10th day of September A. D. 192 0

Air-Way Electric Appliance Corporation

By Pratt E. Tracy President.

Newton A. Tracy Secretary.

State of Ohio
Lucas County } ss.

Pratt E. Tracy, and Newton A. Tracy,

being first duly sworn, depose and say that they all did execute and sign the foregoing certificate for and on behalf of said corporation, and that ~~the~~ same is their free act and deed, and is the free act and deed of said Air-Way Electric Appliance Corporation

WITNESS WHEREOF, Said Air-Way Electric Appliance Corporation has caused its corporate seal affixed and its corporate name to be hereunto attached by an officer thereof, to-wit: its President

10th day of September, A. D. 1920

(L. S.)

Air-Way Electric Appliance Corporation

By Pratt E. Tracy

State of Ohio
County of Lucas } ss.

Pratt E. Tracy, being duly sworn, deposes and says that he is an officer, to-wit: President of Air-Way Electric Appliance Corporation that he executed the foregoing statement, in the name and on behalf of said corporation, and caused its corporate seal to be thereto affixed; that he was authorized to make such statement and to execute the same by authority of the corporation, and that the statements therein are true.

Pratt E. Tracy

Sworn to before me and subscribed in my presence, this 10th day of September, A. D. 1920

Seavey E. C. Moor

(L. S.)

Notary Public

State of Ohio
Lucas County, } ss.

I, Wm. F. Renz, Clerk of Common Pleas Court within and for the county aforesaid, do hereby certify that Seavey E. C. Moor whose name is subscribed to the foregoing acknowledgement as a Notary Public was at the date thereof Notary Public, in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to the same is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Toledo this 2ns day of October, A. D. 1920

(L. S.)

Wm. F. Renz, Clerk

M. Kaefer, Deputy.

✓ Exhibit 4 to Tracy's affidavit ~~Exhibit 4~~

(ATTACH COPY OF ARTICLES OF INCORPORATION HERE)

TO THE SECRETARY OF STATE,
COLUMBUS, OHIO:

of said corporation; they further declare, on oath, that the charter or certificate of incorporation hereto attached is a true copy
es of incorporation or charter of said Air-Way Electric Appliance Corporation

Pratt E. Tracy

Newton A. Tracy

worn to before me and subscribed in my presence, this 10th day of September A. D. 192

[L. S.] Seavey E. C. Moor

Notary Public

Ohio,
of Lucas, } ss.

I, Wm. F. Renz, Clerk of Common Pleas Court
nd for the county aforesaid, do hereby certify that Seavey E. C. Moor & 618
whose name is subscribed to the foregoing acknowledgment as a Notary Public, was at the date thereo
Notary Public, in and for said county, duly commissioned and qualified, and authorized as su
to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to the same
genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, at Toledo
this 2nd day of October A. D. 192 0

[L. S.] Wm. F. Renz, Clerk

M. Kaefer, Deputy

, Ohio,

, A. D. 192

GENTLEMEN: I hereby accept the appointment as the representative of your company upon whom process may
served, and agree to the designation of my office, Auburn Ave, & 618 Broadway, Toledo
as your principal office in the State of Ohio.

Pratt E. Tracy

State of Ohio, County of Lucas, ss.

Personally appeared before me, the undersigned, a Notary Public in and for said County, this 10th
of September, A. D. 192 0, the above named Pratt E. Tracy
who acknowledged the signing of the foregoing to be his free act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal on the day and year last aforesaid.

[SEAL] Seavey E. C. Moor

Notary Public in and for Lucas County, Oh

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during the preceding twelve months was $— all entered from Ohio", the Chairman of the Tax Commission stated that the Commission would be unable to say the plaintiff corporation was doing interstate commerce and refused to in any way amend or allow an amendment to the report as filed.

The Chairman of the Tax Commission also stated that the tax was correctly computed and that no revision of the bill would be made.

Deponent further says that he then called the attention *to* the Chairman of the Tax Commission to the fact that the report as filed by the plaintiff corporation was one perpared in view of old Section 8728–11, 108 Ohio Laws, Part 2, p. 1293, which said section provided in part as follows:

"and under Section 5503 shall be 3/20 of 1% of the proportion of authorized preferred stock represented by property owned and used and business transacted in this state and one cent for each share of authorized common stock without par value, but not less than $10.00 in any case."

Deponent further says that a corporation having only common stock and of no par value and not preferred stock, did not have to report the amount of business transacted outside of the state of Ohio. The reply of the Chairman of the Tax Commission was that the reports were printed long before new section 8728–11, 109 Ohio Laws, p. 273 was passed. For this additional reason deponent requested the Chairman of the Tax Commission to allow a revision of the statements in the report in reference to the amount of business done in the state of Ohio. Deponent also endeavored to make the [fol. 52] point that because the report was one printed before the new section went into effect that the tax should have been rendered under the old Section 8728–11, 108 Ohio Laws, Part 2, p. 1293.

The Chairman replied that the new law being in force as of August 14th, that the taxes to be paid would have to be paid as prescribed by that section, even though the report was printed according to the old laws.

Further deponent saith not.

Newton A. Tracy.

Sworn to before me and subscribed in my presence this 20th day of December, 1921. Leamy E. C. Moore, Notary Public, Lucas County, Ohio. [Seal.]

[fol. 52a] [File endorsement omitted.]

(Here follow Exhibits 1, 2, 3, and 4 to Tracy's Affidavit, marked side folio pages 52½, 53, 54, 55, 56, 57, 58, and 59.)

[fol. 60] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 193

[Title omitted]

AFFIDAVIT OF S. E. FORNEY—Filed Feb. 11, 1922

STATE OF OHIO,
Franklin County, ss:

S. E. Forney, being first duly sworn deposes and says that he is the member of the Tax Commission of the State of Ohio, named and referred to in the plaintiff's petition herein as C. E. Forney, that he has read the affidavits of Newton A. Tracy and Harry Haudenschild, filed in this case, and admits that said Newton A. Tracy wrote to the Treasurer and Tax Commission of the State of Ohio alleging that a mistake was made in the tax bill rendered to the plaintiff in this case, and that a reply to the letter of said Newton A. Tracy was made, as alleged in his affidavit above referred to.

This affiant further says that shortly thereafter said Mr. Tracy and this affiant had a conversation concerning said tax, during which Mr. Tracy did state that a large part of the manufactured [fol. 61] product of said plaintiff was shipped to other states and did claim that a large part of its business was interstate commerce, but as this affiant now recalls, the facts as detailed in the amended petition and in the affidavit of said Harry Haudenschild, were not stated but that on the other hand said Mr. Tracy did state that the goods were manufactured at Toledo, Ohio, and that the orders for and sales of said goods shipped outside of the state of Ohio, as aforesaid, were finally taken and consummated at the office of said company at Toledo, Ohio, and that while this affiant cannot now remember the exact words of such conversation, the facts as stated therein were not inconsistent with the facts stated in the plaintiff's report then on file with said Commission, and did not indicate or show that said plaintiff was engaged in interstate commerce, as this affiant has understood and been advised as to the meaning of the phrase "interstate commerce," or as described or detailed in the affidavits above referred to. While the amendment of the plaintiff's return was spoken of in said conversation, Mr. Tracy made no demand that the plaintiff be permitted to correct and amend its return and asserted no right to do so.

Affiant further says that copies of said letters written on behalf of the plaintiff to the Tax Commission and to the Treasurer of the State of Ohio, referred to in the plaintiff's affidavit herein, and which were written before the conversation above referred to, are hereto attached, made a part hereof, and marked Exhibits "A" and "B" respectively, and that in neither of said letters were there any facts stated or claims made as to the interstate character of the plaintiff's business or any claim or intimation that the facts contained in

[fol. 62] the plaintiff's original report were untrue or misstated, the letter to the State Treasurer repeating what was alleged in the return that "practically all of the property of the Air-Way Electric Appliance Corporation is located in the State of Ohio."

S. E. Forney.

Sworn to before me and subscribed in my presence this 29th day of December, 1921. C. J. Randall, Notary Public, Franklin County, Ohio. [Notarial Seal Franklin County, Ohio.]

[fol. 63] EXHIBIT A TO FORNEY'S AFFIDAVIT

October 28, 1921.

Tax Commission of the State of Ohio, Columbus, Ohio.

GENTLEMEN:

In re Air-way Electric Appliance Corp.

The officials of the Air-Way Electric Appliance Corporation were astounded the other day when they received from the Treasurer of State a statement calling for the payment of $20,000.00 on or before December 1st. There surely must be some mistake in the assessment made in this instance.

It is true that the corporation has an authorized capital stock of 400,000 shares; 200,000 shares of founders' stock and 200,000 shares of common stock, both without par value. Of this very large number of shares there are subscribed and outstanding only 40,035 shares of founders' and 10,440 shares of common stock. This stock was all disposed of for $7.00 per share or slightly less. The Securities Department has authorized in the past and even at the present time, the sale of both classes of this stock at $7.00 per share.

We believe that instead of assessing the tax under amended section 8728-11, 109 Ohio Laws 277, that this tax should be assessed according to the rulings of the Attorney General 1919 Vol. 2, 1086.

We understand that the Supreme Court has also ruled upon the same section previous to its amendment, but we have not found the case.

You, of course, fully realize that the assessment of a tax in the amount of $20,000 upon a company of this kind is confiscatory and unreasonable.

Kindly let us hear from you, at once, as we desire to have this matter cleared up before December 1st arrives, which is the time fixed for payment.

Yours very truly, (Signed) Tracy, Chapman & Welles.

[fol. 64] EXHIBIT B TO FORNEY'S AFFIDAVIT

Copy

October 27, 1921.

Mr. R. W. Archer, Treasurer of State, State of Ohio, Columbus, Ohio.

DEAR SIR:

In re No. 1407, Air Way Electric Appliance Corporation

Our client, The Air-Way Electric Appliance Corporation, received through the mail yesterday a statement alleging that said corporation is indebted to the Treasurer of the State of Ohio in the sum of $20,000.00. The bill states "as required by Section 5503 General Code notice is hereby given that an annual fee for the year of 1921 is assessed against the company as follows * * * 400,000 shares of authorized common stock without par value, represented by property and business in Ohio at 5¢ per share, $20,000."

We have carefully examined Section 5503 of the General Code and find no statement authorizing you to charge 5¢ upon the authorized number of non par value shares. That section provides a fee of 3/20 of 1% upon the proportion of authorized capital stock of the corporation represented by property owned and used and business transacted in this state. That section was not amended in 109 Ohio Laws. Section 8728-11, 109 O. L., 277, states:

"Under Section 5503 shall be 3/20 of 1% upon the proportion of the authorized preferred stock represented by property owned and used and business transacted in this state and 5¢ per share upon the proportion of the number of shares of authorized common stock represented by property owned and used and business transacted in this state, but not less than $10.00 in any case."

Practically all of the property of the Air-Way Electric Appliance Corporation is located in the State of Ohio. It has subscribed and outstanding 40,035 shares of founders' stock and 10,440 shares of common stock. All these shares were sold at $7.00 or slightly less per share and at that figure now reflects the true value of all of the property owned by said corporation.

We cite you to opinion of Attorney General 1919 Vol. 2, 1085 and 117 wherein the Attorney General stated:

"When the amount of capital with which a foreign corporation having non par value shares will carry on business is not stated in its articles of incorporation or otherwise fixed and certified to the Secretary of State and Tax Commission so as to bring the company [fol. 65] within General Code 8728-11, the value of the non par value shares of the corporation seeking to do business in this state under General Code Sec. 178 et seq. and also in computing the amount of the annual franchise tax under General Code 5501 et seq. is the real consideration for which such shares have been issued by the com-

pany from time to time in the case of issued shares and the real consideration for which such shares are being offered by the company with respect to the unissued shares, but in the event unissued shares are not being offered at the time of the application or at the time of filing the annual report, the value to be placed upon the unissued shares is the real consideration for which the last non par value shares were issued, and such information should be certified to the Secretary of State and to the Tax Commission."

The Air Way Electric Appliance Corporation is going to stand upon its constitutional rights in this matter if this tax is not figured upon the proper statutory basis. A tax of $20,000.00 upon a corporation owning approximately $400,000.00 worth of property over and above its indebtedness is confiscatory and unreasonable.

Will you kindly call this letter to the attention of the proper authority so that our client may have the necessary relief before the time of payment of the tax is passed?

Yours very truly, (Signed) Tracy, Chapman & Welles.

[fol. 65½] [File endorsement omitted.]

[fol. 66] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

AIR-WAY ELECTRIC APPLIANCE CORPORATION, Plaintiff,

vs.

HARRY S. DAY, Treasurer of the State of Ohio; JOSEPH T. TRACY, Auditor of the State of Ohio; John R. Cassidy, C. E. Forney, C. A. Horn, as the Tax Commission of the State of Ohio, and Thad H. Brown, Secretary of State of the State of Ohio, Defendants.

CERTIFICATE OF EVIDENCE—Filed Mar. 17, 1923

Be it remembered upon the motion for temporary injunction, upon which a decree ordering a temporary injunction was issued herein on the 24th day of February 1923, there was presented to the court and offered and received in evidence on behalf of the plaintiff the following:

1. Bill of Complaint.
2. Amendment to Bill of Complaint.
3. Supplement and Amendment to Bill of Complaint.
4. Affidavits of L. G. Pierce (2) Harry Haudenchild and Newton A. Tracy.
5. Tax bill received from Treasurer of State of Ohio.
6. Report by the Air-way Electric Appliance Corporation to the Secretary of State, dated September 10, 1920 and filed in the office of the Secretary of State on November 8, 1920.

7. A report made by the Air-way Electric Appliance Corporation to the Secretary of State, dated September 10, 1920 filed in the Office of the Secretary of State on November 8, 1920.

8. 1921 annual report of the Air-way Electric Appliance Corporation, dated July 29, 1921, filed in the office of the Tax Commission August 1, 1921.

9. All exhibits other than those above mentioned which were offered in evidence.

[fol. 67] The following evidence was introduced on behalf of the defendants:

1. Affidavit of S. E. Forney.

The above mentioned papers and affidavits constitute all the evidence presented to this court upon the said motion for temporary injunction.

In witness whereof I have signed and sealed this certificate this 17 day of March, 1923.

J. E. Sater, Judge District Court for the Southern District of Ohio, Western Division.

[fol. 67½] [File endorsement omitted.]

[fol. 68] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 193

[Title omitted]

On Application for Temporary Injunction

Before Donahue, Circuit Judge, Sater and Peck, District Judges

OPINION

Per Curiam:

The Court, as constituted for the hearing of this cause, was assembled in accordance with the provisions of Section 266 of the Federal Judicial Code, to determine whether a temporary injunction should issue on account of the alleged invalidity of certain statutory enactments by the General Assembly of Ohio.

The plaintiff, a Delaware corporation for profit, created in July, 1920, is engaged at Toledo, Ohio, in the manufacturing business. Its authorized capital stock consists of 400,000 shares of common non-par stock, one-half of which is denominated common stock and the residue, as is permitted by Sec. 8728-1, Ohio G. C., is known as founders stock. It began to do business in Ohio August 1, 1920, and thereafter was duly admitted into the state for that purpose. The

Ohio statute first recognizing corporations with no par value stock was passed by the General Assembly April 16, 1909 (108 O. L., Pt. 1, 507), Sec. 11 of such act being designated Sec. 8728-11 of the [fol. 69] General Code. That section was repealed and an amended section 8728-11 substituted in its stead by the act of February 4, 1920 (108 O. L., Pt. 2, 1287). The amended section was repealed by the enactment of April 28, 1921 (109 O. L., 273), and its place was taken by the present section 8728-11, which section by appropriate reference is also amendatory of Sec. 5503. The recital in the notice given to plaintiff that the fee or tax of $20,000 levied against it for the privilege of exercising its franchises in Ohio for the fiscal year beginning July 1, 1920, was charged under Sec. 5503, is therefore unimportant, although the rate at which the fee or tax was computed is that fixed by the present section 8728-11. Under Sec. 4599, a foreign corporation for profit doing business in the state, and owning and using a part or all of its capital or plant in the state, is annually, within the month of July, required to make a verified report, in writing, on a prescribed form, to the Tax Commission, showing, among other things, the amount of its capital stock subscribed, issued and paid up, the character of its business and the places in which it is conducted, the name and location of its office or offices and of its officer or officers, the value of the property owned and used by it in the state, where such property is situated, and the value of its property owned and used outside of the state and where such property is located. Secs. 5499, 5500, 5501. From such report and other pertinent facts coming to its knowledge, the Tax Commission, on the first Monday in September, determines the proportion of the company's authorized capital stock represented by its property and business in the state, and on the first Monday of October certifies the amount of such proportion to the Auditor of State (Sec. 5502). On or before October 15, the Auditor is required, by the present section 8728-11, to charge, under Sec. 5503, for collection from such company for the privilege of exercising its franchises in the state, a fee of three-twentieths of one per cent upon the proportion of the [fol. 70] authorized preferred stock represented by property owned and used and business transacted in the state, and five cents per share upon the proportion of the number of shares of authorized common stock, represented by property owned and used and business transacted therein. The fee is payable on or before the following December 1 (Sec. 5504). The fees, taxes and penalties required to be levied are made a first and best lien on all the corporation's property (Sec. 5506). The penalties which may be inflicted for non-payment of the sum assessed are a fine for each day's delinquency (Sec. 5507), the cancellation of the corporation's authority to do and an injunction against its doing business within the state (Secs. 5509, 5512), and ouster by quo warranto proceedings from exercising its privileges and franchises in Ohio. The plaintiff executed its verified report on July 30, 1921, and filed the same with the Tax Commission on August 1. Its report shows that of the 400,000 shares of authorized stock, 40,475 shares of so-called founders stock and 10,010 shares of

common stock had been subscribed for and issued; that the actual value of its property, including its real estate of the value of $29,500, is $458,278.56, which sum is also the total value of its property owned and used in Ohio; that the amount of business transacted in Ohio in the eleven months of its operation was $250,594.58; that the value of its property owned and used outside of Ohio is nothing; that all of its business had been "handled in Ohio;" and that all of its property is taxed in Ohio,—(the assessed value for taxation being $213,240.00.) Plaintiff charges injunctive relief should be granted because the fee or tax assessed against it constitutes a cloud upon the title to its property, is erroneously computed, excessive, confiscatory, and based on enactments (especially Secs. 5503 and 8728-11) which create a classification which is unreasonable, arbitrary, unsubstantial and discriminatory against foreign as compared with domestic corporations, which are in conflict with the provisions of the State constitution prohibiting the enactment of retroactive laws (Sec. 28, Art. [fol. 71] 2), the equal protection clause (Sec. 2, Art. 1, Bill of Rights) and the uniform taxation rule (Art. 12, Sec. 2), and which are also violative of the commerce clause of the Federal constitution, the due process of law and the equal protection clauses of the fourteenth amendment, and also the clause prohibiting the making and enforcement of laws which abridge the privileges or immunities of citizens of the United States.

At the threshold is the question as to whether the sum charged against plaintiff was imposed under a retroactive law and is therefore illegal for the reason that Sec. 28, Art. 2, of the constitution of Ohio declares "The General Assembly shall have no power to pass retroactive laws or laws impairing the obligations of contracts." The act embracing the present section 8728-11 was approved by the Governor on May 14, 1921, and filed with the Secretary of State on May 17. Sec. 1*c*, Art. 2, of the state constitution provides that "No law passed by the General Assembly shall go into effect until ninety days after it shall have been filed by the Governor in the office of the Secretary of State," excepting, by the terms of Sec. 1*d*, "Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety shall go into immediate effect." The act contains no emergency clause, and does not purport to be and is not an emergency law. The basis for the computation of the plaintiff's franchise tax or fee is the proportion of the authorized stock, preferred and common, represented by property owned and used and business transacted in the state at the close of June 30. If the act became effective when it was filed with the Secretary of State on May 17, the computation of the sum charged against the plaintiff must be according to the present section 8728-11 (Dodge v. Nevada Natl. Bank, 109 Fed., 726, 730, C. C. A. 9); if the act did not become effective until ninety days subsequent to such filing, i. e., until Au- [fol. 72] gust 15, the tax or fee assessed should be reckoned at the much lower rate prescribed by the act of February 4, 1920, else a

tax would be retroactively imposed on subject-matter not theretofore liable to the same. Dodge v. Nevada Natl. Bank; Smith v. Dirck, 283 Mo. 188; Wagoner v. Evans, 170 U. S. 588; Burgess v. Salmon, 97 U. S. 381; Metz v. Hagerty, 51 O. S. 521; Cincinnati v. Seasongood, 46 O. S. 296; Drexel & Co. v. Commonwealth, 46 Pa. St., 31; Young v. Town of Henderson, 76 N. C. 420. A tax may be laid for the double purpose of regulation and revenue. Adler v. Whitbeck, 44 O. S. 539, 572; Fritsch v. Board of Commissioners of Salt Lake City, 15 Utah, 83, 95; Parish of E. Feliciana v. Levy, 40 La. 332. It may also be exacted for the privilege of exercising corporate franchises in the state and for general revenue (State v. Ferris, 53 O. S. 314, 329; Ashley v. Ryan, 49 O. S. 504, 525; Gundling v. Chicago, 177 U. S. 183, 189), the enactment of laws providing for excise and franchise taxes being authorized by Sec. 10, Art. 12, of the state constitution. If the statute of 1921 was enacted as a revenue measure as well as to fix the charge against foreign corporations for the privilege of exercising their franchises in the state, it then falls within the terms of Sec. 1*d*, Art. 2, and became effective on May 17. Sec. 8728-11 and Secs. 5503 and 5516, which are a part of the Ohio Tax Commission act, mention the sum to be charged as a fee. Other sections of such act characterize such sum as a fee or tax. See Secs. 5505, 5506, 5509, 5511, 5512. The terms "fee" and "tax" were, in the legislative mind, convertible and equivalents. It is immaterial whether the sum charged is characterized as a fee, a tax, or an assessment, if on the whole it is clear that it is a tax. Ashley v. Ryan, p. 525. In view of the provisions of Sec. 181*a*, R. S. (now Sec. 270, G. C.), that all money paid into the state treasury, the disposition of which is not otherwise provided by law, shall be credited by the Auditor of State to the general revenue fund, it was held, in Ashley v. Ryan, p. 526, that is is not necessary that [fol. 73] the object of a given statute should be stated to be the imposition of a tax for revenue purposes in order to constitute it a statute of that character. The tax or fee charged against a foreign corporation under the statute here considered is expressly required to be paid to the state treasurer, Secs. 5503, 5504; and Sec. 5491 further provides that all taxes received by the state treasurer under the provisions of the Tax Commission act shall be credited to the general revenue fund. But any exaction which is made a means of supplying money for the public treasury to defray the expenses of government, and any sum demanded as a franchise fee or excise tax which goes into the state treasury and constitutes a part of its general fund is a tax (Mays v. Cincinnati, 1 O. S. 268, 273, 274), and the law providing for the same is a revenue law (Peyton v. Bliss, F. C. No. 11,055). A portion of the Tax Commission act was reviewed by this court in Ohio River & W. Ry. Co. v. Dittey, 203 Fed., 537, 540, and in Ohio Tax Cases, 232 U. S. 576, 592. It was ruled in both cases that the sum assessed was an excise or privilege tax. The statute of April 11, 1902 (95 O. L. 124), whose constitutionality was determined in Southern Gum Co. v. Laylin, 66 O. S. 578, in fixing the annual fee to be charged domestic and for-

eign corporations respectively for the privilege of doing business in Ohio, employed the same language (excepting as to the amount of the fee) as occurs in Sections 5498 and 5503, of the Tax Commissin act. It was said at p. 593 that the tax exacted by the statute is an excise or franchise tax for general revenue. In the later decision of Saviers v. Smith, 101 O. S. 132, 135, 142, the act imposing a license tax on motor vehicles for the purpose of certain incidental police regulations and the maintenance and repair of public roads was held to be manifestly for the production of revenue and is in fact a revenue measure. In the light of the authorities and the provisions and purposes of the statute here considered, it is clear that such statute is a general revenue measure and is not retroactive, but became immediately operative under Sec. 1*d*, Art. 2, of the state [fol.74] constitution at the time it was filed with the Secretary of State on May 17. See also State v. Roose, 90 O. S. 345. If the law is valid, the plaintiff is taxable at the rate specified therein. The insistence that the act authorizing corporations having no par stock is not a revenue measure because only one or two of its sections deals with the tax to be imposed, is unsound, as appears from the teachings of the Dittey case, the Ohio Tax Cases, and Saviers v. Smith.

There is no merit in the contention that the enactments under consideration are obnoxious to Sec. 2, Art. 12, of the State constitution, which declares that laws shall be passed taxing by uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also real and personal property according to its true value in money. That section is not a limitation upon the power to tax rights, privileges and franchises. A franchise may be valuable, but it is not property within the meaning of such section, and is not therefore taxable under it. State v. Ferris, at pp. 328, 329; Western Union Telegraph Co. v. Mayer, 28 O. S. 521, 522; Ashley v. Ryan, at p. 525; Ohio River & W. Ry. Co. v. Dittey, at p. 544; Ohio Tax Cases, at pp. 588, 589. The above mentioned section is without application to the present case.

It is firmly settled that a state law is unconstitutional and void which requires a party, natural or artificial, to take out a license or pay a franchise tax for carrying on interstate commerce, and, if such commerce is burdened directly or by necessary operation of the law now before us when reasonably interpreted, such law must be adjudged invalid, whatever may have been the purpose for which it was enacted and although the plaintiff as a manufacturing company may do both an interstate and a local business. In whatever language the law may be couched, its purpose must be determined by its natural and reasonable effect. Among the cases relied upon by the plaintiff and illustrative of the principles above announced are [fol. 75] Western Union Tel. Co. v. Kansas, 216 U. S. 1, in which a law was held unconstitutional as trammeling interstate commerce which exacted as a charter fee to be credited to the permanent school fund and as a condition of a corporation's right to do local business in Kansas, payment of a given per cent of its authorized capital representing all its property both within and without the state, and

International Paper Co. v. Massachusetts, 246 U. S. 135, in which a statute, also revenue in its character, was held to place a prohibitive burden on interstate commerce and was overthrown because it imposed a license fee or excise tax of a given per cent of the par value of the entire authorized capital stock and consequently on the entire business and property of a foreign corporation doing both an inter and an intra state business and owning property in a number of states. Every case, however, involving the validity of a tax must be decided upon its own facts. Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 86; Kansas City M. & B. R. Co. v. Stiles, 242 U. S. 111, 119. Considering the language of the Ohio statute and its natural and reasonable effect, it is not subject to a construction that would impose a tax on the interstate commerce transacted by a foreign corporation and must be held not to embody the objectionable features found in the statutes called in question in Western Union Tel. Co. v. Kansas, International Paper Co. v. Massachusetts, or in such cases as Looney v. Crane Co., 245 U. S. 178, Pullman Co. v. Kansas, 216 U. S. 56, and Ludwig v. Western Union Tel. Co. 216 U. S. 146. In Western Union Tel. Co. v. Kansas, and Pullman Co. v. Kansas, for instance, the corporations were chartered to engage in interstate commerce. Their interstate and intrastate business were necessarily intimately, if not inseparably, connected, and, being public service corporations, they had no option to decline to engage in either. In Southern Ry. Co. v. Greene, 216 U. S. 400, the plaintiff had entered the state of Alabma in compliance with the laws of that state, had acquired property permanently located and had engaged in both inter and intra state commerce. A new and additional franchise was thereafter imposed upon it for the privilege of doing business which was not imposed upon domestic [fol. 76] corporations. The plaintiff's situation is not the same as that of the plaintiff in any of the three cases just mentioned. It is a manufacturing company, not a public service corporation, and is clothed with the right to confine its operations to such classes of business and to such localities as it sees fit. The distinction between cases of the character of this and the last three named is clearly drawn in Baltic Min. Co. v. Massachusetts, Kansas City M. & B. R. Co. v. Stiles, Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S. 132, 140, and Chaney Bros. Co. v. Massachusetts, 246 U. S. 147, 156, 157. By the express language of the Ohio statute the tax imposed affects only the proportion of the authorized stock, common and preferred, represented by property owned and used and business transacted in the state. Such proportion is easily ascertained. The plaintiff and all others similarly situated are required to keep and report separately the value of their property owned and used and business transacted in interstate and intrastate business—such being but a matter of mere book-keeping—for the purpose of franchise taxation and to submit such amounts separately to the Tax Commission. The proportion of authorized capital stock is only used as the measure of a tax, lawful in itself, without the necessary effect of burdening interstate commerce. The method of obtaining such

proportion is likened to that provided by the Massachusetts law upheld in Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 552. The language of Sec. 8728-11 is quite as explicit, if not more so, in its exclusion of interstate commerce transactions from taxation, as the sections of the Tax Commission act imposing a tax on railroads. Nevertheless, in the Dittey case, at pp. 540, 548, and the Ohio Tax Cases, at p. 591, there was a refusal to hold that the act as applied to railroads lays a burden on interstate commerce. The statute in question does not offend the commerce clause of the constitution. In view of the conclusion thus reached, it is clear that the act properly construed does not deny to plaintiff due process of law and that plaintiff may not be taxed on its interstate business and on the proportion of its authorized stock represented by prop-
[fol. 77] erty owned and used and business transacted in other states.

Nor is there merit in the claim that a foreign corporation is not accorded a hearing before the imposition of the tax. In determining the proportion of the authorized capital of a foreign corporation with reference to which the tax is imposed, the Tax Commission considers the company's verified report and any other facts coming to its knowledge (Sec. 5502). Before such determination and the certification thereof to the Auditor of State are made, the corporation or any person interested may apply to the Commission for a review and correction of its finding. The record suggests the plaintiff took no action touching the tax to be levied against it until after notice of the amount thereof had been given it by the State Treasurer. It then by letter lodged complaint with him and the Tax Commission and was informed no mistake had been made in assessing the tax. Subsequently a representative of plaintiff interviewed the Chairman of the Commission, at the conclusion of which the Chairman declined to reduce the amount assessed. The Tax Commission act (102 O. L. 224) amply provides for a hearing on the part of the taxpayer before an assessment is made against it. The Commission is authorized and directed to be in continuous session and open to the transaction of business during all of the business hours of each and every day excepting Sundays and holidays (Sec. 4); to keep a record of all its proceedings (Sec. 4); to adopt reasonable and proper rules and regulations to govern its proceedings and to regulate the mode and manner of all valuations of real and personal property, apportionments, investigations, inspections and hearings (Sec. 12); to conduct investigations, inquiries and hearings, to issue orders and to render decisions (Sec. 7),—the decisions of the Commission to be based upon its examination of all the testimony and records (Sec. 19); to inspect the books, accounts, records and memoranda of any corporation, to administer oaths, and to examine any corporate officer or agent (Sec. 14); to require any corporation or witness, by order or subpœna to be served upon it as in a case pending in the Common Pleas Court, to produce under penalty any books, papers, records and
[fol. 78] the like (Secs. 15, 23): and to cause disobedience to any such order or subpœna to be punished as contemptuous (Sec. 24): to provide for stenographic reports of evidence taken before it and

cause the same to be transcribed (Sec. 28); to take the required action for the payment of fees to officers serving subpœnas and the fees and mileage of witnesses (Sec. 25); and to call to its assistance the Attorney General of the state, or, under his direction, the Prosecuting Attorney of any county (Sec. 11). The corporation is given the privilege of subpœnaing witnesses (Sec. 25) and of taking the depositions of others within or without the state (Sec. 27). Sec. 5517 specifically accords a hearing. The hearing afforded, although less formal, may be substantially as exhaustive as a trial in a duly organized court. In Hodge v. Muscatine County, 196 U. S., 276, 281, 282, it was said:

"If the taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, whether the proceedings for review take place before a board having a quasi judicial character, or before a tribunal provided by the State for the purpose of determining such questions, due process of law is not denied. It was held by this court in Pittsburgh &c. Ry. Co. v. Backus, 154 U. S., 421, 426, that a hearing before judgment, with full opportunity to present the evidence and the arguments which the party deems important, is all that can be adjudged vital. See also King v. Mullins, 171 U. S., 404."

See also Louisville & N. R. Co. v. Greene, 244 U. S., 522, 536.

The plaintiff may not complain because the statute provides no appeal from the decision of the Tax Commission. The right of appeal is not essential to due process of law. Reetz v. Michigan, 188 U. S., 505, 508.

When the plaintiff voluntarily sought and was granted the privilege of transacting business in Ohio it was charged with knowledge of the long established Ohio rule in the taxation of corporations, domestic and foreign, and of their classification for that purpose. By the provisions of the Willis act, 95 O. L. 124, which was sustained in Southern Gum Co. v. Laylin (decided in 1902), corporations were so classified with reference to the annual fee to be paid by them that [fol. 79] domestic corporations were required to pay one-tenth of one per cent upon all their subscribed or issued and outstanding capital stock, and foreign corporations were taxed one-tenth of one per cent upon the proportion of their authorized capital stock represented by property owned and used and business transacted in Ohio. The classification thus made has persisted. The precise language employed in the Willis act as to the fee to be charged domestic corporations is found in Sec. 5498, and as to that to be assessed against foreign corporations in Secs. 5503 and 8728-11. The syllabus of the Southern Gum Company case (the syllabus in Ohio stating the law of the cause with reference to its facts) makes it clear that the classification above mentioned as to the kinds of corporate entities was approved in its entirety. At the time the plaintiff was authorized to do business in Ohio Sec. 8728-11 as enacted in 1919 (108 O. L. Pt. 2, 1287) required a domestic corporation having no par stock to pay as an annual franchise tax three-twentieths of one per

cent upon all its subscribed or issued and outstanding preferred stock, plus ten cents for each share of its common stock subscribed or issued and outstanding, regardless of whether the property represented by it in whole or in part is within or outside of the state, while a foreign corporation having the same kind of stock was required to pay annually as a franchise tax under Sec. 5503 three-twentieths of one per cent of the proportion of its authorized preferred stock represented by property owned and used and business transacted in the state, plus one cent for each share of its authorized common stock. The statute thus described discriminated against domestic corporations. The act of 1920 (109 O. L. 273) amended Sec. 8728-11 by making the charge on common stock for both classes of corporations five cents per share, thereby placing them on an equal or at least a more nearly equal footing and maintaining the classification policy which had so long obtained in the state. If the early enactments on non par stock were unchangeable, imperfections [fol. 80] and errors in legislation would become constitutional rights; but the plaintiff, when admitted to do business in Ohio, acquired no vested right to have perpetuated a discriminatory law favorable to itself. Sec. 2, Art. 12, of the state constitution expressly provides that corporations may be classified and that there may be conferred upon proper boards, commissions and officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations in this state, as may be prescribed by law; and, as heretofore stated, Sec. 10, Art. 12, authorizes the enactment of laws providing for excise taxes. The state did not exceed constitutional limitations by enacting a new and more onerous law regarding the franchise tax of foreign corporations. In Chaney Bros. Co. v. Massachusetts, at p. 157, it is ruled that—

"A state does not surrender or abridge its power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits."

See also Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S., 132, 139. If the statute here considered does not always operate equally upon foreign as compared with domestic corporations, it does not necessarily follow that it denies to plaintiff the equal protection of the law or is confiscatory in character. In State v. Fulton, 98 O. S., 350, 356, it is said a foreign corporation does not in all instances pay the same tax as a domestic corporation. If under the statute domestic corporations are favored the statute is not necessarily invalid, for no limitation upon the power of the state to exclude foreign corporations requires identical taxing in all cases of domestic and foreign corporations. Baltic Min. Co. v. Massachusetts, p. 88. In Northwestern Mut. L. Ins. Co. v. Wisconsin, p. 140, it was held that—

[fol. 81] "It is no denial of equal protection for a state to impose a different rate upon one of its own corporations than that imposed

upon a foreign corporation, for the privilege of doing business within its borders. Kansas City, Memphis & Birmingham R. R. Co. v. Stiles, 242 U. S. 111, 118."

In the Dittey case the precise question here raised was fully discussed at pp. 540-546, and the conclusion reached was approved by the Supreme Court. Ohio Tax Cases, pp. 589, 590. One of the plaintiff railway companies was so unproductive that, under prudent economical management (and the same situation arose in State Railroad Cases, 92 U. S. 575), it was operated at a loss. The Ohio Cases arising out of the statute imposing a tax on the liquor traffic and involving an exercise of the police power as well as that of taxation for revenue, were reviewed, in each of which the statute assailed was sustained, although the Ohio court recognized that many persons of small means would be driven out of the liquor business. A foreign corporation occupies a relation to the state different from that of the domestic corporation. It may withdraw from the state of its adoption wealth in the form of dividends and profits to the state of its origin. In entering another state a corporation seeks to control a part of the business of that state in competition with the corporations created under its laws. The domestic corporation usually has within its taxing jurisdiction all or a large part of its personal and possibly real property subject to taxation. The foreign corporation may have and frequently has a large amount of its property in the state of its domicile and there subject to taxation, but exempt from taxation in the state into which it is admitted to do business. On account of the difference in the attitude of the two classes of corporations a variance may be had in the rate of taxation. In the light of the conclusion reached in the Southern Gum Company, Dittey, and Ohio Tax Cases, it must be held that the statute under consideration is a general law, a part of a comprehensive system of corporate taxation, operating on all corporations of a given class throughout the state and is not to be [fol. 82] overthrown merely because in some instances it may produce hardship on weak corporations or corporations whose organizers improvidently provided for an excessive authorized capital stock. Absolute equality and uniformity is impracticable in any known system of taxation and is not required by the equal protection clause of the constitution. An approximation to equality is all that is practicable. Inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat a law. See the Dittey case, pp. 543, 544, and authorities there cited, and Maxwell v. Bugbee, 250 U. S. 525, 543. In the instant case the plaintiff's incorporators voluntarily elected to fix their authorized capital stock at 400,000 shares. They have disposed of only about 50,000 shares at the price of seven dollars per share as fixed by the state securities department. If, when tax paying time comes, its officers and stockholders find its authorized capital excessive, productive of a needless financial burden and harmful to them in their competition with others engaged in like manufacturing (and there are some thus engaged), there is no apparent impediment obstructing

their reduction of such capital. Prudent managers of foreign corporations doing business in Ohio will have no occasion to charge in good faith that the statute is confiscatory or denies their companies the equal protection of the laws.

The plaintiff's position is not unlike that of the White Company, whose status was determined in Chaney Bros. Co. v. Massachusetts. Plaintiff acquired real estate in Toledo, improved it and at considerable cost adapted it to the manufacture of much used commodities. When it was admitted to do business in Ohio the statute in existence bore more heavily on domestic than on foreign corporations. By an amendment an increased rate was imposed on entries of the latter class. Plaintiff's real estate is employed in a business in which there is considerable competition in Ohio. The investment in enterprises [fol. 83] of like character must be large. The sale or leasing of factories such as the plaintiff owns for the production of the same, or allied, or different products in a thriving city, such as Toledo is, is not infrequent. The record does not suggest that the plaintiff will be by the franchise tax law subjected to the confiscation of its property, or to great or substantial loss, or that its property is not readily salable at a reasonable price to other persons in the same or other kinds of business. Plaintiff's investment is not of the permanent character of those made by railroad or telegraph companies, but may be removed from one place to another and its equipmnt, when so transferred, put to a use like the present. It may be noted that in Underwood Typewriter Co. v. Chamberlain, 254 U. S. 114, 122, it was stated in plaintiff's brief, although not assigned as error or presented in argument, that the tax imposed on the plaintiff, a manufacturing corporation, was void under the fourteenth amendment because the company had made large permanent investments in Connecticut before the taxing statute was enacted. The objection, it was said, was clearly unsound.

In response to the claim that the privileges and immunities of the plaintiff as a citizen are abridged by the statute in question, suffice it to say that the plaintiff is not a citizen within the meaning of the constitutional provision which declares that the citizens of each state shall be entitled to the privileges and immunities of citizens in the several states. Paul v. Virginia, 8 Wall. 168; Western Union Tel. Co. v. Mayer, 28 O. S. 521. None of the constitutional objections urged are valid. On the contrary, if the tax here in question burdens the interstate commerce transacted by plaintiff, that fact is due, not to any inherent or constitutional defect in the law itself, but to a mistake or misunderstanding as to the nature and extent of plaintiff's business, for which the plaintiff is largely responsible.

Following the notice to plaintiff of the assessment of a tax of $20,000 against it, it wrote the Tax Commission and the State Treasurer, complaining of the amount and discussing what it deemed the applicable law, neither of which letters were helpful as to a determination of the amount of business done within or without the state excepting the rather indefinite statement in the letter to the Trea- [fol. 84] surer that practically all of the property of the company is located in Ohio. The answer to both letters was that no mistake

had been made as to the sum levied. Subsequently a representative of the plaintiff interviewed the chairman of the Tax Commission, and, as he now claims in his affidavit, related the facts as to plaintiff's interstate business as he then knew them and approximately as outlined in the evidence of this case. The chairman states that, as he recalls, the matters detailed in the affidavit of plaintiff's vice-president and in the amendment to the bill were not submitted, although the claim was asserted that a large part of plaintiff's business was interstate in character. His recollection is that the statements made were not inconsistent with those embodied in plaintiff's annual report heretofore mentioned and that no demand was made for permission to correct or amend such return. The representations made by plaintiff's agent were manifestly not supported by the sanctity of an oath. The chairman, but not the Tax Commission as such, declined to reduce the tax charged. The statement in plaintiff's verified filed report that all of its business had been "handled from Ohio" suggests that some part of it reached beyond the state; but in such report it is twice averred that plaintiff has no property outside of Ohio, and in its sworn application for leave to do business in Ohio, filed November 8, it alleges the value of its property in the state to be $750,000 and "the proportion of the capital stock of the company represented by property owned and used and by business transacted in Ohio is practically all." Such proportion was apparently deemed so slight as to be unworthy of segregation. In view of the evidence before the Tax Commission and the uncertain character of the same, we are not prepared to say the Commission was not warranted in making the $20,000 assessment or in adhering to it. The plaintiff submits an affidavit that of its total business, amounting to $250,594.58, the property sold within the state is represented by $70,602.30. It would seem that this court may not consider such affidavits to condemn the conclusion reached by the Commission. [fol. 85] Manufacturers Light & Heat Co. v. Ott., 215 Fed. 940, 950. We feel, however, that a determination of the proportion of plaintiff's property owned and used and business done inside and outside of Ohio is a proper subject of inquiry, absolutely essential to the determination of the question whether any part of the tax is levied upon the proportion of its authorized stock, if any, represented by property owned and used and business transacted beyond the state. The Ohio law (Sec. 5517) requires a corporation desiring a review of any determination, finding or order made by the Tax Commission to file an application therefor within sixty days from the date of the Commission's certification of its action. Such Commission may then upon such application make such correction in its determination, finding or order, as it may deem proper, and its decision in the matter is final. The legislation essential to the establishment of the amount of the tax is then concluded and the judicial stage is then reached. Bacon v. Rutland R. R. Co., 232 U. S. 134. The plaintiff, without awaiting the lapse of sixty days, prematurely instituted the present suit. The provisions of the Ohio statute differ in various respects, which need not be detailed, from those of the Virginia constitution and act under consideration in Prentis v. Atl. Coast Line,

211 U. S. 210, but the rule of comity there observed and the mode of procedure there adopted should, as far as practicable, control here. Whether the action of the plaintiff after it was notified of the assessment made against it rose to the dignity of a request or demand for a rehearing before the Tax Commission, and whether that body, if a request for a rehearing yet be made, will conclude that the request is not timely, or, out of a desire to be accurate and just, will grant a rehearing, regardless of the lapse of time, are questions for the Commission to decide. In Palermo Land & Water Co. v. Railroad Commission, 227 Fed. 708, the defendant in open court offered to entertain an application for a rehearing, although the usual time for applying therefor had expired. In the instant case the defendants have stipulated that the plaintiff's present status, during the pendency of this case and until its decision, shall be maintained, and that plaintiff shall not be subjected to any penalties, fines or forfeitures by reason of any default on its part in the payment of the tax charged against it. Being thus amply protected, the court need not at this time [fol. 86] trouble itself over the question of injunctive relief or render final decision. Pending an application for review before the Tax Commission and the disposition of the same, the present bill will be retained to await the result of such procedings. When the conclusion reached is properly presented to the court, it will take such final action as it deems proper.

All of the costs of this proceeding will be taxed against the plaintiff, for the reason that, had it proceeded in an orderly and reasonably thorough manner, the occasion for the present suit would probably never have arisen.

—— ——, United States Circuit Judge. —— ——, United States District Judge. —— ——, United States District Judge.

[fol. 87]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

PETITION FOR LEAVE TO FILE SUPPLEMENTAL BILL—Filed Feb. 24, 1923

Now comes the Air-Way Electric Appliance Corporation, by its solicitors and represents to the Court that since the filing of the bill of complaint, and the amendment and supplement to the bill of complaint herein, the term of office of the following defendants has expired:

R. W. Archer, Treasurer of the State of Ohio, Harvey C. Smith, Secretary of the State of Ohio and Daniel J. Ryan, member of the Tax Commission of the State of Ohio.

Plaintiff further says that the succesors in office of the above named parties are: Harry S. Day, Treasurer of the State of Ohio, Thad H. Brown, Secretary of the State of Ohio, C. A. Horn, Member of the Tax Commission of the State of Ohio.

Plaintiff further represents that the above named successors to the defendants are necessary parties to this cause and that complete relief cannot be granted unless they are parties defendant.

Wherefore, plaintiff prays the Court for leave to file a supplemental bill against the said H. S. Day, Treasurer of the State of Ohio, Thad H. Brown, Secretary of the State of Ohio and C. A. Horn, Member of the Tax Commission of the State of Ohio to making them parties defendant in this suit with prayer allegations to change them [fol. 88] as such and with such prayer for relief as may be proper.

Tracy, Chapman & Welles, Solicitors for Plaintiff.

[fol. 88½] [File endorsement omitted.]

[fol. 89] ———

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

ORDER GRANTING LEAVE TO FILE SUPPLEMENTAL BILL—Filed Feb. 24, 1923

It appears from supplemental Bill of Complaint of Air-Way Electric Appliance Corporation filed this day, that Harry S. Day, Treasurer of the State of Ohio, Thad. H. Brown, Secretary of State of the State of Ohio, C. A. Horn, member of the Tax Commission of Ohio, are necessary parties to the relief sought in this suit and to a complete determination of the matters involved;

It further appearing that said parties consent to be made defendants in this suit and consent to the filing of a supplemental bill;

It is therefore ordered, adjudged and decreed that said Harry S. Day, Treasurer of the State of Ohio, Thad. H. Brown, Secretary of State of the State of Ohio, and C. A. Horn of the Tax Commission of Ohio, be, and the same hereby are, made defendants in this suit, and the Bill of Complaint, amendment and supplement to bill of complaint be dismissed as to R. W. Archer, Harvey C. Smith and Daniel J. Ryan.

It is further ordered that the plaintiff be granted leave to file a supplemental bill against said Harry S. Day, Treasurer of the State of Ohio, Thad. H. Brown, Secretary of State of the State of Ohio, [fol. 90] and C. A. Horn, member of the Tax Commission of the State of Ohio.

J. E. Sater, District Judge.

[fol. 90½] [File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[fol. 91] In Equity. No. 193

AIR-WAY ELECTRIC APPLIANCE CORPORATION, Complainant,

vs.

HARRY S. DAY, Treasurer of the State of Ohio; JOSEPH T. TRACY, Auditor of State of the State of Ohio; John R. Cassidy, C. E. Forney, C. A. Horn, as the Tax Commission of the State of Ohio, and Thad. H. Brown, Secretary of State of the State of Ohio, Defendants.

SUPPLEMENTAL BILL OF COMPLAINT—Filed Feb. 24, 1923

Air-Way Electric Appliance Corporation for its supplemental bill of complaint herein says that on November 28, 1922, an original bill of complaint was filed by it in this court against R. W. Archer, Treasurer of the State of Ohio, Joseph T. Tracy, Auditor of the State of Ohio, John R. Cassidy, C. E. Forney and Daniel J. Ryan, as the Tax Commission of the State of Ohio, and Harvey C. Smith, Secretary of State of the State of Ohio. That thereafter an amendment to the bill of complaint and an amendment and supplement to the bill of complaint were filed in this court against said defendants.

That during the pendency of said suit and before any decree or order was entered therein, the following changes in the defendant State officials occurred, to-wit:

Harry S. Day, a resident of Columbus, Ohio, succeeded the said R. W. Archer as Treasurer of the State of Ohio and now is the duly elected, qualified and acting Treasurer of the State of Ohio. Thad [fol. 92] H. Brown, a resident of Columbus, Ohio, succeeded the said Harvey C. Smith as Secretary of State of the State of Ohio, and now is the duly elected, qualified and Acting Secretary of State of the State of Ohio. That C. A. Horn succeeded the said Daniel J. Ryan as a member of the Tax Commission of Ohio and is now a duly qualified, elected and acting member of the Tax Commission of Ohio.

Upon the petition of the plaintiff heretofore filed, it was ordered by this court that said above named successors in office be substituted for said original defendants and leave was granted to file a supplemental bill against said successors in office.

The allegations of the original bill of complaint filed herein, which allegations are adopted and incorporated with the same force and effect as if rewritten herein, are in substance as follows: That on November 1, 1921, plaintiff received a bill from the Treasurer of the State of Ohio in the amount of Twenty Thousand Dollars ($20,000.00) for the 1921 foreign corporation license fee; that the laws of Ohio under which said license fee was assessed are in contravention with the Constitution of the United States and the State of Ohio; that there are apparent errors in the computation of the tax

under Section 5503 or 8728-11 of the General Code of Ohio; and that unless restrained, the Tax Commission of Ohio, Auditor of State, Treasurer of State and Secretary of State will take the steps required by the laws of Ohio to enforce the lien created by the tax and to cancel its certificate to do business in the State, which will result in irreparable damage to the plaintiff for which it has no adequate remedy at law. The prayer of the bill is that the Tax Commission, Auditor of State, Treasurer of State and Secretary of State be mandatorily ordered to correct the computation of the tax; that they be temporarily enjoined from in any way enforcing the collection of the [fol. 93] tax as computed, and that the injunction be made permanent on a final hearing of the bill.

The allegations of the amendment to the bill of complaint are substantially as follows: That sections 5503 and 8728-11 of the General Code of Ohio are in contravention of the Commerce Clause of Art. 1 Sec. 8 of the Constitution of the United States and that a major portion of its business is transacted in Interstate Commerce. That Section 8728-11 of the General Code of Ohio was not in effect upon the date Plaintiff was required to file its report, that its application is introactive and in contravention of the Constitution of Ohio. The relief asked in the amendment is as prayed for in the original bill.

The allegations of the amendment and supplement to the bill of complaint, which allegations are adopted and incorporated with the same force and effect as if re-written herein, are in substance as follows: that the plaintiff made application to the Tax Commission of Ohio for leave to amend its return by correcting the amount of property owned and business transacted in the State from $708,507.08 to $528,880.86. And that said application was denied by the Tax Commission for want of jurisdiction to entertain such application. The prayer of the amendment and supplement to the bill of complaint is as prayed for in the original bill and that the Tax Commission be required to vacate its order denying plaintiff leave to amend its return to determine the amount of business done in Interstate commerce, to refigure the tax accordingly, and that the defendants be enjoined from collecting or attempting to collect the part of the tax assessed which amounts to an interference with Interstate commerce.

Plaintiff further says that unless restrained by an order of this Court, Harry S. Day, the now Treasurer of the State of Ohio will proceed to collect the tax assessed under said unconstitutional laws; [fol. 94] that Thad H. Brown, the now Secretary of State of the State of Ohio will cancel said Articles of Incorporation and that C. A. Horn, a member of the Tax Commission of the State Ohio, will refuse to vacate said order, denying plaintiff the right to amend said return, and will certify the non-payment of said tax to other state officials.

Wherefore plaintiff prays as prayed for in its original, amendment, and amendment and supplement to the bill of complaint herein and for a mandatory order against C. A. Horn, as a member of the Tax

Commission of Ohio to allow plaintiff to amend its return, and that Harry S. Day, Treasurer of the State of Ohio, Thad H. Brown, Secretary of State of the State of Ohio and C. A. Horn, a member of the Tax Commission of Ohio, be enjoined from in any way endeavoring to collect the tax as assessed and for such other relief as the Court may deem equitable.

Tracy, Chapman & Welles, Solicitors for Plaintiff.

[fol. 95] STATE OF OHIO,
Lucas County, ss:

Pratt. E. Tracy, being first duly sworn, deposes and says that he is President of Air-Way Electric Appliance Corporation, plaintiff herein, that the facts stated in the foregoing supplemental bill are true as he believes. Pratt. E. Tracy.

Sworn to and subscribed in my presence this 23 day of February, 1923. Frank A. Hannington, Notary Public, Lucas County, Ohio. [Notarial Seal, Lucas County, Ohio.]

[fol. 95½] [File endorsement omitted.]

[fol. 96] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

WAIVER AND ENTRY OF APPEARANCE—Filed Feb. 24, 1923

The above named defendants and each of them, by their solicitor, hereby waive the issuance and service of process on the supplemental bill of complaint filed in the above entitled cause.

Harry S. Day, Treasurer of the State of Ohio, Thad H. Brown, Secretary of State of the State of Ohio, and A. C. Horn, of the Tax Commission, expressly consent to being made parties defendant and voluntarily enter their appearance herein.

C. C. Crabbe, Attorney General; William J. Meyer, Solicitor-for Defendants.

[fol. 96½] [File endorsement omitted.]

[fol. 97] IN THE DSTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

STIPULATION—Filed Feb. 24, 1923

It is hereby stipulated between counsel for the parties in the above entitled cause as follows:

1. That the evidence introduced under the original bill of complaint and amendment and supplement to the bill of complaint shall be considered as introduced under the supplemental bill of complaint.

2. That no other or further evidence shall be introduced by either party under said supplemental bill, and that no other or further hearings will be requested by either party.

Tracy, Chapman & Welles, Solicitors for Plaintiff. C. C. Crabbe, Atty. Genl., Wm. J. Meyer, Solicitors for Defendants.

[fol. 97½] [File endorsement omitted.]

[fol. 98] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 193

[Title omitted]

On Application for Temporary Injunction

Before Donahue, Circuit Judge, Sater and Peck, District Judges

OPINION—Filed Dec. 8, 1922

SATER, *District Judge:*

For reasons stated in our former opinion (279 Fed. 878), the conclusion was reached that the statute under which the tax in question was levied is constitutional. We suggested that, if any error intervened in the calculation of the tax, the plaintiff should endeavor to secure a correction of such error by the tax commission, and to that end the further consideration of the case was continued pending the action of the commission on plaintiff's application. In pursuance of our suggestion the plaintiff filed with the tax commission on February 27 an application for re-hearing and correction of the amount of tax charged against it. On March 27, the Supreme Court of the United States, in Hump Hairpin Mfg. Co. vs. Emmerson, held that under the facts of that case an Illinois statute, similar in given respects to that of Ohio, does not conflict with any provision of the Federal constitution. In that case, as in this, it appeared that all the property of the complaining corporation was located in the state imposing the tax, that all its manufacturing was done in such state, that all contracts for the sale of goods were [fol. 99] approved at the home office within such state, and that there was an honest purpose on the part of the state to differentiate intrastate from interstate business and to use the former only in determining the amount of tax to be paid. In the light, therefore, of the above mentioned decision of the Supreme Court, it is unnecessary

for us to discuss further in this opinion the constitutionality of the Ohio statute.

In view of the terms of Sec. 5517, Ohio G. C. (shown in so far as pertinent in the margin), the tax commission dismissed plaintiff's application on the ground of want of jurisdiction to entertain the same because it had not been filed within sixty days from the certification of the tax to the Auditor of State. It appeared at the original hearing herein and still appears from the record that, prior to the commencement of this action, plaintiff had complained of the assessment against it by letter to the commission and orally to its chairman and had requested the privilege of so amending its return to that body as to show the actual facts as to the business done by it and the necessity for a correction of the assessment to conform thereto. Its request was denied by the chairman, but not by the commission. If it be conceded that the commission's ruling on plaintiff's application of February 27 is correct, nevertheless its original application had never been disposed of and had undoubtedly [fol. 100] been pending all the while before the commission. Such application was perhaps less formal than the statute contemplates, but no objection was made to its form. On the contrary, it was treated as sufficient in that respect. Its dismissal by the chairman on its merits was unavailing. On that application the plaintiff was entitled to the judgment of the tax commission as such and not merely to that of its chairman. McCortle v. Bates, 29 O. S. 419; Grand Island & N. W. R. Co. v. Baker, 6 Wyo. 369, 71 Am. St. 926, 951; Schumm v. Seymour, 24 N. J. Eq. 143, 152; Sections 16, 17 and 19, 102 O. L. 226 (Secs. 1465–14, 1465–15, 1465–17); Secs. 7, 4, 19, 102 O. L. 226 (Secs. 1465–6, 1465–4, 1465–17). By clear import of the law the duty is cast upon each member of the commission to examine into the law and the facts of each case before it quite as fully as each Judge of a court consisting of a plurality of members is required, honestly performing his duty, to examine the law and the facts of every case before such court for decision. The General Assembly has conferred on the commission great powers, but it has also guarded the rights of the taxpayers by surrounding hearings by formality and solemnity almost, if not quite, tantamount to that observed in the trial of cases in a court of record. The taxpayer has a right to the best judgment of the commission as a body, after each member has acquainted himself with the facts of the case and after the members have freely and fully consulted about and discussed the same. To accord less is a failure to conform to the law. The plaintiff did not insist upon its requested re-hearing before the com-

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Sec. 5517. Any bank, public utility or corporation may be heard by the commission upon the question as to the correctness of any determination, finding or order of the commission after the same has been made. Application to the commission for a review of any determination, finding or order by it made, must be filed within sixty days after the passage of this act, or within sixty days from the date of the certification thereof by the commission to the proper officer. The commission, upon such application, may make such correction in its determination, finding or order, as it may deem proper, and its decision in the matter shall be final. Such correction shall be certified to the proper official, who shall correct his records and duplicates in accordance therewith.

mission sitting as a body. It must be presumed such request would have been granted, had it been pressed.

Nor was the tax commission without jurisdiction to grant a re-hearing on plaintiff's later application. It construed Sec. 5517 to mean that jurisdiction is wanting, if the application for a re-hearing is not made within sixty days from the date of the certification of [fol. 101] the assessment to the State Auditor, and that therefore its original decision charging a $20,000 excise tax became final. The word "final," as used in that section, does not mean that the commission's decision is exclusive of further inquiry on its part, for by the terms of Sec. 5554, that body, if it advises and the Attorney General consents, may compromise with the taxpayer and settle any liquidated claim for delinquent taxes, fees or penalties certified by the commission; nor does it mean that the commission's decision is absolute to the exclusion of judicial inquiry. Secs. 5524 and 12075 prohibit such a conclusion. If there was at any time any doubt as to the want of finality of the commission's decision, it was effectually removed by the later act of the General Assembly passed May 20, 1915 (106 O. L. 425), to provide for the correction of errors in determining the amount of taxes and other charges due the state. That act, in so far as pertinent, is as follows:

"That whenever any commission, board or officer of the state makes a finding determining the amount of any tax, assessment or charge against any corporation, company, partnership or person, or makes any charge of any tax, assessment or charge against any corporation, company, partnership or person, pursuant to any law of the state imposing such tax, assessment or charge upon such corporation, company, partnership or person, and, upon the application of the corporation, company, partnership or person so charged and an investigation thereof, such commission, board or officer of the state so making such finding or determining or making such charge, finds that such tax, assessment or charge, or any part thereof, was erroneously charged, such commission, board or officer may make such corrections in its determination, findings or charge as shall be proper. Such corrections shall be entered upon the minutes of the proceedings of such commission, board or officer, and certified to the proper officer who shall correct his records and duplicates in accordance therewith."

That statute makes it clear that the commission had jurisdiction and power to grant plaintiff a re-hearing and to make correction, if it found the tax assessed or any part of the same, to be erroneous. [fol. 102] When the tax commisison dismissed the plaintiff's application of February 27, it not only expressed the views then entertained by it, but also by necessary implication approved the earlier opinion of its chairman. Having finally acted on the tax proceeding before it, the justiciable stage was reached. The question as to the correctness of the tax certified by the commission to the State Auditor is therefore properly before this court.

In the case of Hump Hairpin Mfg. Co. v. Emmerson, supra, it was held that the business done by a corporation, similarly situated to the

plaintiff in this case, with residents of states other than Illinois, is interstate business, and that a state may not use its taxing power to regulate or burden interstate commerce. However, it was concluded in that case that "At the most, the assessment is, so far as interstate commerce is concerned, incidental, remote and unimportant, and it is therefore constitutional." In the instant case, the amount assessed by the commission upon interstate commerce is not remote, incidental and unimportant, but, on the contrary, is a substantial sum levied directly upon the stock representing interstate business. It is wholly unnecessary to consider the power of a state to levy a tax in gross upon a foreign corporation based upon the company's entire business both intrastate and interstate, for as we construe this statute it was not the purpose and intent of the General Assembly of Ohio to include interstate business as a basis for this levy but only as a factor in determining the proportion that should be paid upon strictly state business. The purpose and intent of this statute is further discussed later in this opinion. But wholly aside from this consideration, it is clear from admitted facts, which were not before the tax commission when the assessment in question was made and certified, that the commission has not applied its own announced rule for the ascertainment of the correct amount of tax to be paid by foreign corporations. The plaintiff is manifestly entitled to the benefit of that rule and it must be presumed the tax would have been computed in accordance therewith, if the report of plaintiff to the tax commission had correctly and fully disclosed the facts pertaining to its business. That the commission finally failed to do so through mistake or inadvertence is no reason for denying relief from an erroneous charge. Cooley on Taxation, 1447; Charleston v. County Com'rs., 109 Mass. 270; Dunnell Mfg. Co. v. Inhabitants of Pawtucket, 73 Mass. 277; [fol. 103] City of Wilmington v. Ricaud, 90 Fed. 214, C. C. A. 4; Brown v. French, 80 Fed. 166.

From the pleadings and the evidence the amount of plaintiff's authorized common stock represented by property owned and used and business transacted in the state is readily ascertainable. Having regard to the teachings of the Hump Hairpin Mfg. Company case, which is necessarily controlling, if the amount of plaintiff's property in Ohio ($458,278.56) plus the amount of its business in Ohio ($70,802.30) be divided by the amount of its property in Ohio ($458,278.56) plus its total business transacted ($250,594.58), the resulting quotient multiplied by the number of shares of authorized common stock gives the number of shares (298,520) representing the property owned and used and business transacted in this state. The computation thus made coincides with the result obtained by the use of the formula specifically set forth at pp. 156, 157, in the Ohio Tax Laws compiled by the Tax Commission in 1920, by the use of which it is said "the amount of tax to be assessed under the statute may be worked out with mathematical precision." The tax on 298,520 shares at five cents per share is $14,926—the amount which plaintiff should pay, if there be no valid ground for relief from any part of the same.

It is true that following the above mentioned formula promulgated

by the Tax Commission is a statement (p. 157) expressing the conclusion reached by the Attorney General of Ohio in 1915 (Attorney General's Report, 1915, p. 460), that "The operation of a factory in Ohio by a foreign corporation having its principal place of business in another state constitutes 'doing business' in Ohio, regardless of where the products of such factory are sold or transported; and it is reasonable and lawful under Sec. 5502 to measure the volume of such business by sales of manufactured articles, whether such sales other- [fol. 104] wise represent interstate commerce or not." Sec. 5502 relates to the determination by the Tax Commission of the proportion of the authorized capital stock of a foreign corporation represented by its property and business in the state and the certification of the same to the Auditor of State. If in determining the amount of the state excise tax the use made of the amount of sales representing interstate business is such that the tax affects interstate commerce so directly and immediately as to constitute a genuine and substantial burden or restraint upon such commerce, the view expressed in the above quoted passage is under the rule announced in the Hump Hairpin Mfg. Company case unusual, and, if the statute here under consideration is in its general operation productive of such a result, it must fail for want of constitutionality. The annual tax assessed against a foreign corporation is, it is true, for the privilege of exercising its franchises in the state, but the interstate business being a factor in measuring the amount, if the tax be excessive on account of such factor, the net result is the substantial and genuine fettering of such business.

The plaintiff contends that we held in our former opinion a statute constitutional which taxes a domesticated foreign corporation with 400,000 shares of non par value common stock, of which but 50,485 shares are subscribed, issued and outstanding, a franchise fee of $20,000, and a domestic corporation with identically the same number of shares of stock authorized and outstanding, a fee of $2,534.25. The opinion warrants no such conclusion. The plaintiff voluntarily entered the state for the transaction of business. It was chargeable with knowledge that under the Ohio rule as fixed by legislation and judicial determination (Southern Gum Co. v. Laylin, 66 O. S. 578, State v. Fulton, 98 O. S. 350), the tax exacted of foreign corporations, whether it be the initial or the annual tax for the privilege of exercising their franchises in the state, is not always the [fol. 105] same as that imposed on domestic corporations,—favors when extended running ordinarily in favor of the latter. The original initial fee exacted of a domestic corporation for the privilege of doing business was assessed on the subscribed or issued and outstanding stock and has always remained so, whereas in the case of a foreign corporation the act of May 16, 1894 (91 O. L. 272) provided that such corporation desiring to enter the state for business purposes should file a statement showing the proportion of its capital stock represented by property owned and used and business transacted in the state, and directed that, from the facts thus reported and any other facts coming to his knowledge bearing upon the question, the Secretary of State shall determine the proportion of capital

stock represented by its property and business in Ohio and shall charge and collect for the privilege of exercising its franchises in Ohio one-tenth (subsequently changed to three-twentieths) of one per cent upon the proportion of its authorized capital stock represented by property owned and used and business transacted in Ohio, "being the same fee required to be paid by a corporation formed under the laws of Ohio." The above provisions remained in all the amendments to that act (93 O. L. 225; 94 O. L., 225; 95 O. L., 539; 96 O. L. 496), until the General Code was adopted in 1911, when the above quoted words were omitted for the reason such language amounts to an incorrect statement—it not being true that a foreign corporation in all instances pays the same tax as that exacted of a domestic corporation (State v. Fulton), the divergence between a domestic and a foreign corporation in the amount of the excise tax to be paid being dependent on its holdings within the state and on whether the foreign corporation is excessively capitalized. The Willis law, enacted April 11, 1902 (Secs. 5502, 5503, G. C. being parts of it) imposed an annual in addition to the initial tax on foreign corporations to the amount of one-tenth (later increased to [fol. 106] three-twentieths) of one per cent upon the proportion of the authorized capital stock of corporations represented by property owned and used and business transacted in Ohio. That act contained no recital that the tax was the same as required of domestic corporations. It was sustained in its entirety as a constitutional statute in the Southern Gum Company case. In State v. Tomlinson, 99 O. S. 233, 238, the Southern Gum Company case was cited to the point that in Ohio an excise or franchise tax may be imposed upon foreign corporations is no longer debatable, the only limitation upon the legislative power in that respect being that the tax be reasonable and the operation of the tax be uniform upon all corporations of a class throughout the state. It thus appears that Ohio has consistently adhered to a policy which does not always produce equality as between domestic and foreign corporations in franchise taxation.

The local courts have, however, uniformly held that a statute reasonably interpreted which directly and substantially by its necessary operation burdens interstate commerce, is invalid, whatever may have been the purpose for which it was enacted and although the complaining party does both interstate and intrastate business. Castle v. Mason, 91 O. S. 296, 307; McGuire v. State, 42 O. S. 530, 534; Arnold v. Yanders, 56 O. S. 417, 421; Western Union Tel. Co. v. Mayer, 28 O. S. 521, 528, et seq. The General Assembly, recognizing that rule in the enactment of the statute here in question (Sec. 8728-11), and showing an honest purpose to differentiate state from interstate business and to use only the former in determining the amount of the excise tax, exempted interstate business from taxation. There is present no circumstance indicating a purpose or necessary effect in the authorized tax to burden such business. The tax of five cents is not assessed on all of a foreign corporation's authorized non par value stock, nor on all of its property owned and [fol. 107] used in Ohio or on all of its business done therein, but on

the fractional part only of its authorized common stock represented by property owned and used and business transacted in Ohio, as determined with reference to all the property owned and used and all the business transacted everywhere. The tax is not computed or directly imposed upon business done in, or upon the proceeds of, interstate commerce. The $179,972.28 resulting from interstate business is but one of the factors employed in measuring the portion of authorized common stock upon which an assessment was to be made. The other factors are the value of the property in Ohio and the amount of intrastate business. The plaintiff's mode of transacting its business is such that all of its sales are made in Ohio. This being so, although most of its transactions take on an interstate character, yet all of them contain the elements of a sale which takes place within the state and represent business done within it; but, on account of its sales of interstate character, the tax is less than it would have been had shipments been restricted to Ohio. The large tax to which the plaintiff is liable is due to its extensive property holdings in the state and its extravagant capitalization. Under the statute a domestic corporation having 50,485 shares of common non par value stock subscribed or issued and outstanding would be taxed $2,524.25. If plaintiff's authorized stock was for that same number of shares it could be taxed on only 37,637 of them, or to the amount only of $1,881.85. If, under the rule heretofore applied, the plaintiff's authorized common stock was 60,000 shares, its tax would have been $2,238.90; if 80,000 shares, $2,985.20; if 100,000 shares, $3,731.50; if 140,000 shares, $5,224.10. The difference between this last named sum and what an Ohio domestic corporation having 50,485 shares subscribed for or issued and outstanding would have to pay is almost precisely the sum charged against the Hump Hairpin Mfg. Company in excess of what that company claimed should [fol. 108] be assessed against it (see 293 Ill. 387), which excess was held not to burden interstate commerce unlawfully. The plaintiff unwisely authorized common stock to the extent of about eight times the number of shares sold, but had the capital authorized been fairly such as its present and its reasonably near future needs would probably require, its tax would either have been less than that of a domestic corporation of like capital which had disposed of or had obtained subscriptions for its entire stock, or would not, in any event, have materially exceeded that chargeable to a domestic corporation which had stock subscribed for or issued and outstanding to the amount only of 50,485 shares. The plaintiff asks the court to relieve it from an anomalous situation which it voluntarily and improvidently created. The court will not hold an inspection law unconstitutional which in occasional years yields an income considerably in excess of the cost of inspection. Castle v. Mason, 91 O. S. 296, 305; Cleveland Refining Co. v. Phipps, 277 Fed. 463, 466; Foote v. Maryland, 232 U. S. 494, 504. The same rule forbids declaring a tax law invalid merely because some corporation on account of its extravagant capitalization, suffers temporarily self-imposed hardship, of which it may in the future relieve itself, if it so

desires, by a reduction of its authorized capital. This doctrine finds support in L. & N. R. Co. v. State, 201 Ala., 317, 318, as follows:

"We are not unmindful of the rule of the United States Supreme Court that in determining the validity of a statute it will not be confined to form, but will go to the substance of the act and condemn it, if in the ordinary enforcement and operation thereof it results in a violation of the constitution, though unobjectionable in form. * * * There can be little or no discrimination between domestic and foreign corporations in the general and ordinary operation of our statute. Of course, there may be instances when the burden will fall heavier on the one than the other, in case a foreign and a domestic corporation may both be undercapitalized, as well as rare cases when the burden may fall heavier upon a domestic corporation which is overcapitalized; but in dealing with the vitality of our [fol. 109] statutes, and especially when it also involves the life of certain sections of our organic law, we must measure them by general conditions rather than obsolete or exceptional instances."

After the above was written, our attention was called to People v. Walsh, 195 N. Y. Supp. 184. The case, on account of the difference in local statutes, is without application. The New York statute employs the term "capital stock employed," and the courts of that state have construed "capital stock" to mean "capital," so that the tax is determined with reference to the capital employed. Under Sec. 8728-11 here under consideration, the tax by express language is to be computed at "five cents per share upon the proportion of the number of shares of authorized common stock, represented by property owned and used and business transacted in this State." The authorized capital stock, whether it be common or preferred, or both, beginning with the earliest legislation on the subject has always been the basis for computing the excise tax (whether initial or annual) to be assessed against a foreign corporation. See Ohio G. C., Sections 183, 184, 185, 5502 and 5503, as well as Sec. 8728-11.

A majority of the court concurs in the foregoing conclusions and that the correct amount of tax chargeable against the plaintiff is $14,926. An order may be taken accordingly.

[fol. 109½] [File endorsement omitted.]

[fol. 110] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

In Equity. No. 193

[Title omitted]

DECREE—Filed Feb. 24, 1923

This cause came on to be heard on the motion of the plaintiff for a temporary injunction on the 11th day of February, 1922, before

Honorable Maurice H. Donahue, Circuit Judge, Honorable John E. Slater and Honorable John W. Peck, District Judges, pursuant to notice duly given, and the Judges concurred in an opinion duly filed, holding that Section 5503 of the General Code of the State of Ohio and Section 8728-11 of the General Code of the State of Ohio are constitutional and valid and not in contravention of Article I, Section 8 of the Constitution of the United States of America, or the equal protection of the law or due process of law provisions of the Fourteenth Amendment to the Constitution of the United States, or Section 2, Article I of the Bill of Rights of the State of Ohio, or Section 2, Article XII of the Bill of Rights of the State of Ohio, or Section 28, Article II of the Constitution of the State of Ohio, concerning [fol. 111] retroactive legislation, and that said Sections of the General Code of the State of Ohio are in all respects valid, to each and all of which holdings and findings the plaintiff separately excepts, but the decree upon said motion was held in abeyance by said Court, pending an application by plaintiff for a review before the Tax Commission of the State of Ohio and disposition thereof and a proper application being made to this Court for further proceedings upon said motion.

Thereafter said motion came on for further hearing at this term of Court and was argued by counsel, and upon such hearing it was made to appear to the Court that on or about the 27th day of February, 1922, the plaintiff filed an application before the Tax Commission of the State of Ohio, requesting that it be allowed to amend its return and that the tax assessed against it be refigured so that no part of said tax would result in burdening plaintiff's interstate commerce; that said application was denied by said Tax Commission, whereupon plaintiff filed herein its amendment and supplement to the bill of complaint, and thereupon upon consideration, the Court finds:

1. That Sections 5503 and 8728-11 of the General Code of the State of Ohio are not in contravention of the Constitution of the United States or the State of Ohio, to all of which finding plaintiff excepts.

2. That the Tax Commission of the State of Ohio should have granted plaintiff the right to amend its return, so that it would properly show the amount of business transacted by it in interstate commerce, to all of which finding defendants except.

3. That the Tax Commission of the State of Ohio should have refigured the plaintiff's tax upon the following basis:

(*a*) That the plaintiff corporation has a total authorized capitalization of 400,000 shares, no par value stock.

[fol. 112] (*b*) That there are 298,520 shares of such authorized capital representing the property owned and used and business transacted in the State of Ohio, to all of which finding plaintiff excepts, and to all of which finding defendants except.

(*c*) That the tax on these shares at five cents per share, as provided by Section 8728-11 of the General Code of the State of Ohio, should be $14,926.00, to all of which finding plaintiff excepts, and to all of which findings defendants except.

Wherefore it is now ordered, adjudged and decreed as follows:

That the motion by the plaintiff for a temporary injunction herein be granted in part as follows:

That upon the plaintiff giving bond in the amount of $500.00, with surety approved by the court, the Tax Commission of Ohio and each member thereof and their successors are mandatorily enjoined and directed to allow the plaintiff to amend its return by showing the amount of business transacted outside of Ohio, and they are hereby temporarily enjoined from in any way certifying the non-payment of a tax in excess of Fourteen Thousand Nine Hundred Twenty-six Dollars ($14,926.00); that the Secretary of State, Auditor of State and Treasurer of State are hereby enjoined from collecting or attempting to collect any part of the tax in excess of Fourteen Thousand Nine Hundred Twenty-six Dollars ($14,926.00), or the penalty, or any part thereof.

To all of which defendants duly except.

Said bond in the sum of $500.00 was thereupon filed by plaintiff and approved by the court.

It is further ordered, adjudged and decreed that the motion of the plaintiff for a temporary injunction herein, except as hereinabove noted, should be, and hereby is denied, to all of which orders plaintiff duly excepts.

That the cost- upon the first hearing of the motion for the temporary injunction herein are assessed against the plaintiff in the sum of $—, to all of which orders plaintiff duly excepts.

That all costs subsequent to the first hearing upon said motion be [fol. 113] and hereby are assessed against the defendants in the sum of $—, to all of which defendants duly except.

It is further ordered that the exceptions of the defendants, and each of them, and the exceptions of the plaintiff taken in open Court to these findings and decree, and every part thereof, be noted and allowed.

Approved: C. C. Crabb, Attorney General; William J. Meyer, Special Counsel, Attorneys for Defendants.

Approved: Tracy, Chapman & Welles, Solicitors for Plaintiff.

[fol. 113½] [File endorsement omitted.]

[fol. 114] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

In Equity. No. 193

[Title omitted]

INJUNTION BOND—Filed Feb. 24, 1921.

UNITED STATES OF AMERICA,
Eastern Division of the
Southern District of the
State of Ohio, ss:

Know all men by these presents, That Air-way Electric Appliance Corporation, as principal, and Fidelity & Deposit Company, of Maryland as surety, are held and firmly bound unto Harry S. Day, Treasurer of the State of Ohio; Joseph T. Tracy, Auditor of State of the State of Ohio; John R. Cassidy, C. E. Forney, C. A. Horn, as the Tax Commission of the State of Ohio, and Thad H. Brown, Secretary of State of the State of Ohio, in the sum of Five Hundred Dollars ($500.00), to the payment of which they bind themselves, each for its successors and assigns, firmly by these presents.

Sealed with their seals and dated this 24 day of February, 1923. [fol. 115] The condition of the above obligation is such that whereas Air-Way Electric Appliance Company, citizen of the State of Delaware, having filed on the chancery side of the District Court of the United States for the Eastern Division of the Southern District of the State of Ohio, a bill against the said Harry S. Day, Treasurer of the State of Ohio; Joseph T. Tracey, Auditor of State of the State of Ohio; John R. Cassidy, C. E. Forney, C. A. Horn, as the Tax Commission of the State of Ohio, and Thad H. Brown, Secretary of State of the State of Ohio, and having obtained an allowance of a temporary injunction as prayed for in said bill from said court.

Now, if the said Air-way Electric Appliance Corporation shall abide the decision of said court and pay all money and costs which shall be adjudged against it in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force and effect.

Air-Way Electric Appliance Corporation, By Pratt E. Tracy, President. [Seal of the Air-Way Electric Appliance Corporation, Delaware.] Fidelity & Deposit Company of Maryland, By Neil E. Buker, Attorney-in-Fact. [Seal of the Fidelity & Deposit Company of Maryland.] O. K. C. C. Crabbe, Attorney General.

[File endorsement omitted.]

[fol. 116] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

PLAINTIFF'S PETITION FOR AND ORDER ALLOWING APPEAL—Filed Feb. 24, 1923

The above named plaintiff, conceiving itself aggrieved by the decree made and entered on the 24 day of February, 1922 in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record of the proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Tracy, Chapman & Wells, Solicitors for Plaintiff. Dated February 24, 1923.

The foregoing petition for appeal is allowed.

J. E. Sater, District Judge. Dated Feby. 24, 1923.

[fol. 116½] [File endorsement omitted.]

[fol. 117] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

PLAINTIFF'S ASSIGNMENT OF ERRORS—Filed Feb. 24, 1923

The plaintiff prays an appeal from the interlocutory order made and entered herein on the — day of February, 1923, to the Supreme Court of the United States and assigns for error:

First. The said court erred in finding that Sec. 8728-11 of the General Code of Ohio is not in contravention of the Constitution of the United States, especially of the equal protection and due process clauses of Sec. 1, Art. XIV.

Second. The said court erred in finding that Secs. 5503 and 8728-11 of the General Code of Ohio are not in contravention of the Constitution of the United States, especially of the equal protection clause of Sec. 1, Art. XIV, and the privilege and immunity clause of Sec. 2, Art. IV.

Third. Third said court erred in finding that Secs. 5503 and 8728-11 of the General Code of Ohio are not in contravention of the Constitution of the United States, especially of the interstate commerce clause of Sec. 8, Art. I.

Fourth. The said court erred in finding that Sec. 8728-11 of the General Code of Ohio is not in contravention of the Constitution of Ohio, especially of the retroactive clause of Sec. 28, Art. II and Art. I of the Bill of Rights.

[fol. 118] Fifth. The said court erred in finding that Secs. 5503 and 8728-11 of the General Code of Ohio are not in contravention of the Constitution of Ohio, especially of the uniform rule clause of Sec. 2, Art. XII.

Sixth. The said court erred in determining the tax at the rate of five cents (5¢) per share of the authorized capital stock without par value, represented by property owned and business transacted within this state without regard to its true value or its value as determined by the Securities Commission of Ohio.

Seventh. The said court erred in not granting a temporary injunction against the collection of any part of the tax as assessed.

Wherefore, plaintiff prays that the decree of the said court be reversed as to that portion of the decree sustaining the determination of the tax as to Fourteen Thousand Nine Hundred Twenty-Six Dollars ($14,926.00).

Tracy, Chapman & Wells, Solicitors of Plaintiff.

[fol. 118½] [File endorsement omitted.]

[fol. 119 & 120] In the District Court of the United States for the Southern District of Ohio, Eastern Division

[Title omitted]

Plaintiff's Bond on Appeal to the Supreme Court of the United States—[for $500.00; Approved by Sater, J., and Filed Feb. 24, 1923; Omitted in Printing]

[fol. 120½] [File endorsement omitted.]

[fol. 121] In the District Court of the United States for the Southern District of Ohio, Eastern Division

[Title omitted]

Citation and Service on Harry S. Day et al.—Filed Feb. 24, 1923

United States of America, *ss:*

Whereas, Air-Way Electric Appliance Corporation has appealed to the Supreme Court of the United States from a decree rendered in the District Court of the United States for the Southern District of Ohio, Eastern Division, entered on the 24 day of February, 1923,

and has filed the security required by law; you are hereby cited to appear before the United States Supreme Court at the City of Washington, on or after the 21 day of May next.

Given under my hand, at the City of Columbus, in the Sixth Circuit, this 24 day of February, 1923.

J. E. Sater, Judge of the District Court of the United States for the Southern District of Ohio, Eastern Division.

[fol. 122] Service of the above citation acknowledged this February 1923.

C. C. Crabbe, Atty. General, William J. Meyer, Solicitor- for Appel-ees.

[fol. 122½] [File endorsement omitted.]

[fol. 123] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

CITATION AND SERVICE ON HARRY S. DAY, et al.—Filed Feb. 24, 1923; Omitted; Printed Side Page 121

[fol 124] [File endorsement omitted.]

[fol. 125] IN THE UNITED STATES DISTRICT COURT IN THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Mar. 3, 1923

To the clerk of the above-entitled court:

You will please prepare a transcript of record in this cause to be filed in the office of the Clerk of the United States Supreme Court, pursuant to an appeal heretofore allowed and included in said transcript, the following pleadings, proceedings and papers on file, to-wit:

Bill of Complaint, Waiver, Stipulation, Motion for Temporary Injunction, Answer to Bill of Complaint, Amendment to Bill of Complaint, Answer to Amendment to Bill of Complaint, Memorandum Opinion, Amendment and Supplement to Bill of Complaint, Answer to Amendment and Supplement to Bill of Complaint, Affidavits of Pratt E. Tracy, Harry Haudenschild, Lawrence G. Pierce and Newton A. Tracy, Exhibits 1, 2, 3, 4. Affidavit of S. E. Forney, Pe-

tition for leave to File Supplemental Bill, Order Granting Leave to File Supplemental Bill of Complaint, Supplemental Bill of Complaint, Waiver and Entry of Appearance, Stipulation, Memorandum of Opinion, Decree, Injunction Bond, Petition for Appeal, Assignment of Errors, Appeal Bond, Præcipe for Transcript of Record, Clerk's Certificate to Transcript of Record and Citation.

Said Transcript to be prepared as required by law and the rules of the United States Supreme Court.

Tracy, Chapman & Welles, Solicitors for Plaintiff.

[fol. 126] Service of copy of the foregoing Præcipe for transcript of record in the above case, acknowledged this 2nd day of March, 1923.

Charles C. Crabbe, Attorney General; William J. Meyer, Special Counsel, Solicitors for Defendants.

[fol. 126½] [File endorsement omitted.]

[fol. 127] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

PRÆCIPE FOR ADDITION TO AND DIMINUTION OF TRANSCRIPT OF RECORD—Filed Mar. 9, 1923

To the clerk of said court:

You will pease include in the transcript of record in the above cause in addition to pleadings, papers and exhibits previously specified the following:

1. Certificate of Evidence.
2. Affidavit of L. G. Pierce executed June 2, 1922.
3. Præcipe for addition to and diminution of Transcript of Record.

You will please omit from the transcript of record the affidavit of Pratt E. Tracy, previously specified to be included.

Tracy, Chapman & Welles, Solicitors for Plaintiff.

Service of a copy of the above præcipe acknowledged this 8th day of March, 1923.

C. C. Crabbe, Attorney General; William J. Meyer, Special Counsel, Solicitors for Defendants.

[fol. 127½] [File endorsement omitted.]

[fol. 128] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 193

[Title omitted]

DEFENDANTS' PETITION FOR AND ORDER ALLOWING APPEAL—Filed Mar. 10, 1923

To the Honorable John E. Sater, District Judge:

The above named defendants, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 24th day of February, 1923, do hereby appeal from said decree to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, under the rules of such court in such cases made and provided.

And your petitioners further pray an order relating to the security to be required of them.

Charles C. Crabbe, Attorney General; William J. Meyers, Special Counsel, Solicitors for Defendants.

The foregoing petition for appeal is allowed.

J. E. Sater, District Judge.

[fol. 128½] [File endorsement omitted.]

[fol. 129] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 193

[Title omitted]

DEFENDANTS' ASSIGNMENT OF ERRORS —Filed Mar. 10, 1923

Now come the defendants in the above entitled cause and file the following assignment of errors, upon which they will rely in their prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 24th day of February, 1923.

I

Said court erred in finding that the Tax Commission of the State of Ohio should have granted plaintiff the right to amend its return at a time subsequent to the 11th day of February, 1922, and in not

finding that said Tax Commission of Ohio was without power or jurisdiction to allow plaintiff the right to amend its return at such time.

II

Said court erred in finding that 298,520 shares of the authorized capital of plaintiff represented the property owned and used and business transacted by plaintiff in the State of Ohio, and in not finding a greater number of such shares, and in not finding 400,000 of such shares to represent the property owned and used and busi- [fol. 130] ness transacted by plaintiff in the state of Ohio.

III

Said court erred in finding plaintiff's tax to be $14,926, and in not finding said tax to be in excess of such sum and in not finding said tax to be the sum of $20,000.

IV

Said court erred in enjoining the Tax Commission of Ohio from certifying for collection the non-payment by plaintiff of a tax in excess $14,926.00, and in enjoining the Secretary of State, Auditor of State and Treasurer of State, of the State of Ohio, from collecting or attempting to collect any part of a tax in excess of $14,926.00, or the penalty, or any part thereof.

V

Said court erred in adjudging against defendants the costs incurred in this cause subsequent to the first hearing upon the motion of plaintiff for a temporary injunction.

Wherefore, the appellants pray that said decree be reversed and that said District Court for the Southern District of Ohio, Eastern Division, be ordered to enter a decree reversing its decision in said cause.

Charles C. Crabbe, Attorney General; William J. Meyer, Special Counsel, Solicitors for Appellants.

[fol. 130½] [File endorsement omitted.]

[fols. 131 & 132] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 193

[Title omitted]

DEFENDANTS' APPEAL BOND—For $500 00/100; Approved, Sater, J., and Filed Mar. 17, 1923; Omitted in Printing

[fol. 132½] [File endorsement omitted.]

[fol. 133] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

[Title omitted]

DEFENDANTS' CITATION AND SERVICE—Filed Mar. 17, 1923

UNITED STATES OF AMERICA, ss:

To Air-Way Electric Appliance Corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, in the city of Washington, on the 21st day of May next, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States for the Southern District of Ohio, Eastern Division, from a final decree entered on the 24th day of February, 1923, in that certain suit, being In Equity #193, wherein you are plaintiff and appellee, and Harry S. Day, Treasurer of the State of Ohio; Joseph T. Tracy, Auditor of State of the State of Ohio; John R. Cassidy, C. E. Forney and C. A. Horn, as the Tax Commission of the State of Ohio; and Thad H. Brown, Secretary of State of the State of Ohio, are defendants and appellants, to show cause, if any there be, why said decree, rendered against the said appellants, should not be corrected and why justice should not be done to the parties in that behalf.

[fol. 134] Given under my hand at the City of Columbus, in the Sicth Circuit, this 10th day of March, 1923.

J. E. Sater, Judge of the District Court of the United States for the Souther- District of Ohio, Eastern Division.

Service of the above citation acknowledged this 13 day of March, 1923.

Tracy, Chapman & Welles, Solicitors, for Plaintiff and Appellee.

[fol. 134½] [File endorsement omitted.]

[fol. 135] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 193

[Title omitted]

STIPULATION AS TO USE OF RECORD—Filed Mar. 17, 1923

Whereas, plaintiff in the above entitled cause has obtained the allowance of an appeal to the Supreme Court of the United States, and is causing to be prepared a transcript of the record in said cause; and

Whereas, defendants have also obtained the allowance of an appeal in said cause to the Supreme Court of the United States,

Now, it is agreed between plaintiff and defendants that the transcript of the record filed in the Supreme Court may be used by both plaintiff and defendants on their said appeals.

Tracy, Chapman & Welles, Solicitors for Plaintiff. Charles C. Crabbe, Attorney General; William J. Meyer, Solicitors for Defendants.

[fol. 135½] [File endorsement omitted.]

[fols. 136 & 137] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 193

[Title omitted]

DEFENDANTS' PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Mar. 17, 1923

To the Clerk of the above Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the Supreme Court of the United States, pursuant to an appeal heretofore allowed the defndants, and include in said transcript the following:

Defendants' petition for appeal;
Order allowing appeal;
Defendants' assignment of errors;
Defendants' appeal bond;
Stipulation as to use of record;
Defendants' prærcipe for transcript of record; and Clerk's certificate to defendants' transcript of record and citation.

Said transcript to be prepared as required by law and the rules of the United States Supreme Court.

Charles C. Crabbe, Attorney General; William J. Meyer, Solicitors for Defendants.

Service of a copy of the foregoing præcipe for transcript of record in above case acknowledged this 13 day of March, 1923.

Tracy, Chapman & Welles, Solicitors for Plaintiff.

[fol. 138] [File endorsement omitted.]

[fol. 139] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 193

[Title omitted]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD ON APPEAL AND CROSS-APPEAL

I, B. E. Dilley, Clerk of the District Court of the United States, for the Southern District of Ohio, do hereby certify that the foregoing, consisting of 136 pages, numbered consecutively from page 1 to page 136, is a full, correct and complete transcript of the record of said District Court in the cause entitled "Air-Way Electric Appliance Corporation, Plaintiff, vs. Harry S. Day, Treasurer of the State of Ohio; Joseph T. Tracy, Auditor of State of the State of Ohio; John R. Cassidy, C. E. Forney and C. A. Horn, as the Tax Commission of the State of Ohio; and Thad H. Brown, Secretary of State of the State of Ohio, Defendants," on the appeal by the plaintiff and the cross appeal by the defendants, as agreed upon by the parties and as ordered by the court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at my office, in the city of Columbus, in [fol. 140] said district, this 28th day of March, A. D., 1923.

B. E. Dilley, Clerk, By G. C. Cropper, Deputy Clerk. [Seal of United States District Court, Southern Dis. Ohio.]

Endorsed on cover: File Nos. 29,501, 29,502. S. Ohio D. C. U. S. Term No. 266. Air-Way Electric Appliance Corporation, appellant, vs. Harry S. Day, treasurer of the State of Ohio; Joseph T. Tracy, auditor of the State of Ohio; John R. Cassidy et al., etc. Term No. 267. Harry S. Day, treasurer of the State of Ohio; Joseph T. Tracy, auditor of the State of Ohio; John R. Cassidy et al., etc., appellants, vs. Air-Way Electric Appliance Corporation. Filed March 31st, 1923. File Nos. 29,501, 29,502.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 266.

AIR-WAY ELECTRIC APPLIANCE CORPORATION

vs.

HARRY S. DAY, TREASURER OF OHIO.

No. 267.

HARRY S. DAY, TREASURER OF OHIO,

vs.

AIR-WAY ELECTRIC APPLIANCE CORPORATION.

OPINION OF SUPREME COURT OF ILLINOIS IN THE CASE OF ROBERTS v. EMMERSON.

SUPREME COURT OF ILLINOIS, FEBRUARY 19, 1924.

THOMPSON, *J.*:

Appellant, the Roberts & Schaefer Company, a domestic corporation, filed its bill in the circuit court of Sangamon County against Louis L. Emmerson, as secretary of state, alleging that the total amount of its authorized capital stock is $150,000; that it is divided into 1,000 shares of preferred stock of the par value of $100 a share, and 10,000 shares of common stock of no par value, issued as fully paid at $5

a share; that under the provisions of section 105 of the general corporation act (Smith-Hurd Rev. St. 1923, c. 32), its annual franchise tax should be $75; that the amendment to the section added in 1923, which fixes the value of all stock of no par value at $100 a share, is in contravention of section 1 of article 9 of the Constitution of 1870; that the secretary of state has refused to accept $75 tendered to him by appellant, and demands $550 as the annual franchise tax due from appellant, and threatens to enforce his demands by inflicting the statutory penalty. Appellant prays that the court grant a mandatory injunction against appellee to accept $75 in full for the annual franchise tax due from appellant for the year beginning July 1, 1923, and for other relief. The court held the amendment constitutional and that the tax demanded by the secretary of state was due from appellant, and dismissed its bill for want of equity. This appeal followed.

Section 105 provides: "Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this act to make an annual report, shall pay an annual license fee or franchise tax to the secretary of state of *five cents on each $100 of the proportion of its capital stock,* authorized by its charter in the office of the secretary of state, *represented by business transacted and property located in this State,* but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no tangible property or business in this State. *In the event that the corporation has stock of no par value, its shares for the purpose of fixing such fee shall be considered to be of the par value of $100 per share.*"

All of the property of appellant is located and all of its business is transacted in this State. According to its charter the total amount of its authorized capital stock is $150,000. Appellee contends that the "amount of authorized capital stock," in so far as it is represented by shares of no par value, is not required to be stated in dollars, and that there is a compliance with item 8 of paragraph 4 when the number of such shares is stated. Using this as a premise, he argues that it therefore becomes necessary for the Legislature to establish an arbitrary value for such shares for the purpose of fixing a basis for collecting fees. Considering, as we must, all the provisions of the General Corporation Act, it is clear that the contention that the amount need not be stated in dollars is without merit.

The statement of incorporation must set forth: "(8) The total amount of authorized capital stock;" "(6) the number of shares into which the capital stock is to be divided, whether all or part of the same shall have a par value, and, if so, the par value thereof, which shall not be less than $5, nor more than $100, per share, and whether all or part of the same shall have no par value;" "(9) the amount of such stock which it is proposed to issue at once (which shall not be less than $1,000, all of which must be subscribed);" and "(10) the payment of at least one-half of the capital stock, which it is proposed to issue at once." The term "capital stock," properly speaking, signifies the amount fixed by the corporate charter to be subscribed and paid in by the shareholders of a corporation. It is the property of the corporation contributed by its shareholders to the extent required by its charter. While the capital or assets of a corporation may be increased by accumulation of profits or enhancement in

the value of property or reduced by losses or decrease in values, the amount of the capital stock remains fixed, unless it is increased or reduced by or under legislative authority. Armstrong *v.* Emmerson, 300 Ill., 54; 132 N. E., 768; 18 A. L. R., 693. "The amount of authorized capital stock means the total sum of money necessary to be paid into the treasury of the corporation to secure the issuance of the total number of shares of stock authorized by the articles of incorporation." People *v.* Emmerson, 305 Ill., 348; 137 N. E., 202. The capital stock is divided into a certain number of shares, each share being the interest which the owner or stockholder has in the management of the corporation and in its surplus profits, and, on a dissolution, in all its assets remaining after the payment of its debts. The corporation issues to each stockholder a stock certificate, which is a written acknowledgment of the interest of the stockholder in the corporate property. This certificate of stock is not the stock itself. It is mere evidence of the holder's ownership of the stock and of his rights as a stockholder to the extent specified therein. 5 Fletcher's Cyc. Corp., §3425. If the stock has a stated par value, that par value must be expressed in the certificate, but if the stock is of that variety known as stock having no par value, then the dollar mark does not appear upon the certificates. In either event the stock has, in fact, a par value, *i. e.*, a value equal to the fractional part of the authorized whole represented by it. In the one variety it is expressed on the certificate; in the other it is not. Whatever the character of the certificate issued, each share represents an aliquot part of the total assets of the corporation, regardless of what its nominal or its actual value may be. Rarely, if ever, is the actual value of a share of stock the same as its

nominal value. Practical experience shows that it is impossible to maintain a constant equilibrium between the nominal capital of a corporation and its assets. The par value of a share of stock, whatever the character of the certificate issued to the shareholder, is the fractional part of the share capital, represented by a particular variety of stock, produced by dividing the total amount authorized by the number of shares into which such variety is divided. For example, the par value of the no par value stock of appellant is 1/10,000 of $50,000, or $5. That the amount of the authorized capital stock must be stated in dollars is evidenced by the fact that the legislature has said that the amount which is proposed to be issued at once shall not be less than $1,000. It does not say the minimum may be 200 shares of no par value stock. How is the secretary of State to know when one-half of the amount of capital stock, which it is proposed to issue at once, has been paid, if the amount is not stated in dollars? Section 23 makes directors liable for assenting to an indebtedness in excess of the amount of capital stock of the corporation, and for declaring a dividend which will impair the capital stock. Section 28 requires at least one-half of the amount of an increase in capital stock to be paid in before the new stock is issued, and section 53 makes each stockholder liable to creditors to the extent of any unpaid portion of the shares issued to him. These sections are a nullity, unless the amount of the capital stock of a corporation must be stated in dollars. Whether the stock have a stated par value or have no par value stated, the corporation cannot issue the stock for less than par. In order to secure the issue of all the shares of stock there must be paid into the treasury of the corporation, in cash or its equivalent, the total amount of its au-

thorized capital stock. Under section 32 the corporation is authorized to sell its shares of stock, having no par value for such consideration, not less than $5 nor more than $100 a share, as may be prescribed in the certificate of incorporation, or as from time to time may be fixed by the board of directors pursuant to authority conferred in its certificate, but the price fixed could under no circumstances be less than par. If the total amount of authorized capital stock of a corporation be $10,000 divided into 1,000 shares of no par value, the minimum price for each share must be $10. Section 30 requires each certificate for shares of capital stock to have stamped or printed on it the amount actually received by the corporation for the shares represented by it.

Section 1 of article 9 of the Constitution gives the General Assembly power to tax corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates. The Legislature may classify corporations for taxation (Coal Run Coal Co. *v.* Finlen, 124 Ill., 666; 17 N. E., 11), but the classification must have some reasonable relation to the end proposed by the particular legislation. Springfield Gas Co. *v.* City of Springfield, 292 Ill., 236, 126 N. E., 739, 18 A. L. R., 929; Commonwealth *v.* Alden Coal Co., 251 Pa., 134, 96 Atl., 246, L. R. A., 1916 F, 154; State *v.* Minnesota Farmers' Mutual Ins. Co., 145 Minn., 231, 176 N. W., 756; Hayes *v.* Smith, 58 Mont., 306, 192 Pac., 615. Corporations may be classified as banking, railroad, mining, insurance, and manufacturing, because each of these classes has characteristics which differentiate it in important particulars from the others. But there is no reasonable basis for placing corporations issuing their stock with

a par value in a class different from those corporations issuing no par value stock. Take, for instance, two companies manufacturing the same article by the same process, and each of which has an authorized capital stock of $100,000 divided into 20,000 shares. What possible difference can it make if one of these corporations issues certificates stating a par value of $5, while the other issues certificates which state no par value? The actual par value of the shares in both corporations is exactly the same, and so, also is the liability of the directors and the stockholders to creditors and the rights of the shareholders to participate in the business of the corporation. But under the amendment added in 1923 to section 105 the corporation issuing certificates expressing no par value must pay an annual franchise tax twenty times as large as the corporation issuing certificates expressing a par value. This is a discrimination which finds no basis in authority or in reason. Whether stock be par value or no par value, it merely represents the proportionate interest of the holder in the corporate assets (8 Thompson on Corp. [2d Ed.], §3447*a*), and the burdens of taxation must fall equally upon all corporations of a given character without regard to whether their stock is of the one kind or the other. The amendment is unconstitutional and void. People *v.* Mensching, 187 N. Y., 8, 79 N. E., 884, 10 L. R. A. (N. S.) 625, 10 Ann. Cas., 101.

The decree is reversed, and the cause is remanded, with directions to enter a decree in accordance with the prayer of the bill.

Reversed and remanded, with directions.

IN THE

Supreme Court of the United States

October Term, 1923.

Nos. 266-267.

AIR-WAY ELECTRIC APPLIANCE CORPORATION,
Appellant.

vs.

HARRY S. DAY, TREASURER OF THE STATE OF OHIO, ET. AL.,
Appellees.

HARRY S. DAY, TREASURER OF THE STATE OF OHIO, ET. AL.,
Appellants.

vs.

AIR-WAY ELECTRIC APPLIANCE CORPORATION,
Appellee.

Appeals from the District Court of the United States for the Southern District of Ohio.

REPLY BRIEF FOR APPELLANTS IN CASE NO. 266 AND APPELLANT'S ANSWER BRIEF IN CASE NO. 267.

THOMAS H. TRACY,
GEORGE D. WELLES,
NEWTON A. TRACY,
Solicitors for Appellant in Case No. 266 and for Appellees in Case No. 267.

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APPELLANT'S REPLY BRIEF TO APPELLEES' BRIEF IN CASE NO. 266.

ARGUMENT.

Appellees, in their brief, practically submit their case on the two opinions of the District Court as set out at pages 34 and 51 respectively of the record. The first

of these opinions has been reported in 279 Fed. 878. Outside of the reference to the two opinions mentioned, there are but two other points raised in the argument which we will hereafter discuss.

At the outset of this, our reply brief, we wish to request the court to consider with us the two opinions above mentioned, wherein we respectfully claim that the court committed several grievous errors in answering the following questions:

I.

Is Section 8728-11 of the General Code of the State of Ohio retroactive in effect? Which question the court answered in the negative, Record, pages 36, 37 and 38.

II.

Does the method set forth for the computation of the fee provided for by said Section 8728-11 create a burden upon interstate commerce? Which question the court answered in the negative, Record, pages 38, 39 and 40.

III.

Does the statute deprive appellant of property without due process of law? Which question the court answered in the negative, Record, page 40.

IV.

Does Section 8728-11 of the General Code of Ohio deny to appellant the equal protection of the law? Which question the court answered in the negative, Record, pages 41, 42 and 43.

V.

Is Section 8728-11 of the General Code of Ohio unconstitutional because of the inequality of its burden upon different foreign corporations or between foreign and domestic corporations? Which question the court answered in the negative, Record, page 43.

VI.

Does Section 8728-11 of the General Code of Ohio violate the provisions of the United States and Ohio Constitutions relative to the taking of private property without due process of law? Which question the court answered in the negative, Record, page 44.

I.

Is Section 8728-11 of the General Code of the State of Ohio Retroactive in Effect?

We submit that the District Court was in error in holding that Section 8728-11 of the General Code of Ohio was not retroactive in effect. Record, pages 36, 37 and 38. This section was part of an Act entitled "To Amend Sections 8728-1, 8728-2, 8728-4, 8728-6, and 8728-11 of the General Code Relating to the Formation and Organization of Corporations with Common Stock Without Par Value." The Act was signed by the Governor on May 14, 1921, and filed in the office of the Secretary of State on May 17, 1921.

The provisions of the Constitution of the State of Ohio relative to the time within which laws shall go into effect are as follows:

Article II, Section 1-c:

> "* * * No law passed by the General Assembly shall go into effect until ninety (90) days after it shall have been filed by the Governor in the office of the Secretary of State, except as herein provided. * * *"

Article II, Section 1-d:

> "Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. Such emergency laws upon a yea and nay vote must receive the vote of two-thirds of all the members elected to each branch of the General Assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon. The laws mentioned in this section shall not be subject to the referendum."

Article II, Section 28, provides that the General Assembly shall have no power to pass retroactive laws.

It is appellant's contention, since there was no emergency clause placed within the Act, that it could not possibly go into force and effect until August 17, 1921. The appellant was required to file its report to the Tax Commission of the State of Ohio during the month of July, 1921, and the tax became a lien upon the property of appellant from the 1st day of July, 1921. Hence, if the contention of the state officers was correct, this law has a retroactive effect upon appellant.

The lower court held that this section was a section for general revenue and therefore went into force and effect immediately. There is only one clause in Section 1-d of Article II of the Constitution under which it might be claimed this law came, and that is, laws providing for "tax levies". We submit that this law which provides

for the organization of corporations with common stock without any nominal or par value, and the filing fee for the filing of the articles of incorporation, and the opening of books of subscription, and the sales of stocks, or rights of creditors, or payments of dividends, the redemption of preferred stock, and borrowing capacity, the increase or reduction of stock or the fee therefor, and the reorganization of existing corporations in pursuance to the Act, and the filing of certain affidavits as to debts as liabilities, does not in any way constitute a law for a tax levy. The first paragraph of Section 8728-11 relates to the fees payable by domestic corporations. The second paragraph of said section first provides for the amount of fees a foreign corporation must pay under Sections 184 and 185 of the General Code of the State of Ohio as its permit fee. The last part of said section provides for the annual franchise fees of foreign corporations, as herein discussed. Fees payable under Sections 180, 184 and 185 are payable to the Secretary of State. Fees payable under Section 5503 are payable to the Treasurer of the State. Under what construction can it be said that those fees payable to the Secretary of State are taxes, and that the law containing the language relative thereto, as found in Section 8728-11, is a law levying a tax? The fees provided for in Sections 180, 184 and 185 are license fees for the permission of a foreign corporation to come into and do its first year's business within the State of Ohio. The fee payable by a foreign corporation once admitted to do business in Ohio, and after it has paid its first year's license fee, is nothing more than a fee exacted for the privilege to be enjoyed of doing business within the state. This, likewise, we submit, is a license fee and not a tax, and the law providing for the same is not a law levying taxes.

We submit that when an Act was passed as an entirety, as the Act in question was, and entitled as the Act in question was, it cannot be segregated into sections for the purpose of ascertaining at what time the various sections should go into force and effect, unless the legislature so specifically stated. If the court were inclined to believe us mistaken in this conviction, we assert, as hereinbefore indicated, that Section 8728-11 contains at least three references to matters which could not possibly be called "tax levies". If the court believes it is the law that sections could be segregated in determining at what time the particular sections go into force and effect, we submit that that view cannot be carried far enough to allow the segregating of a particular phrase or clause so that those particular phrases or clauses go into force and effect at one time, and the remaining phrases or clauses in that particular section go into force and effect at another time.

Another reason for our contention that the law is not one providing for a tax levy is, that the remedies of the state for failure to pay the fee are not such as is usual in cases of failure to pay a tax levied on specific property. Then, too, in Ohio a franchise is not considered property. If it were property it would have to be taxed uniformly as provided in Section II, Article XII, of the Constitution of the State of Ohio.

We call attention to the fact that this issue was not raised by the pleadings, as the answer of appellees admitted that the law did not become effective until August 17, 1921.

II.

Does the Method Set Forth for the Computation of the Fee Provided for by Said Section 8728-11 Create a Burden Upon Interstate Commerce?

The lower court answered this question in the negative, because the statute itself provides for a fee of five cents (5c) per share *upon the proportion* of the number of shares of authorized common stock represented by property owned and used and business transacted in this state, Record, pages 38, 39 and 40.

Had not a similarly worded statute been interpreted by the Supreme Court of the State of Ohio in the case of *State ex rel. vs. Fulton,* 98 Ohio State 350, we would submit the interpretation of the words "authorized common stock represented by property owned and used," to mean "issued stock," for unissued stock can represent nothing. If the interpretation placed on that wording by the Supreme Court of Ohio is the true meaning of the same, we submit that said statute is unconstitutional, for reasons hereinafter discussed. We cannot subscribe to the interpretation given this language by the Supreme Court of Ohio, for there the court, after discussing the question, said, on the bottom of page 355:

> "• • • We do not subscribe to this view. It is to be presumed that a foreign corporation will transact at least some business and own some property outside of Ohio and the term 'proportion' is employed in the section upon that theory • • •."

The reason given by the court for its position, as above quoted, we respectfully submit, is unwarranted in fact, for the section under discussion at that time was what is known as Section 184 of the General Code of the State of Ohio, relating to the first license fee to be paid

by a foreign corporation to the Secretary of State. The corporation paying said franchise fee must make a statement prescribed under Section 183 of the General Code of the State of Ohio, which says in part:

> "Before doing business in this state, a foreign corporation organized for profit *and owning or using a part or all of its capital or plant in this state* shall make and file with the Secretary of State, * * * etc." (*Italics ours.*)

In face of such a statement by the legislature, the Supreme Court of Ohio states in its opinion that it is to be presumed that the foreign corporation will transact at least some business and own some property outside of Ohio. The same language that we have italicized in quoting Section 183 appears in Section 5499 of the General Code of the State of Ohio, requiring foreign corporations to make their annual report during the month of July. The construction placed upon such wording by the Supreme Court of Ohio amounts to the taking of property without due process of law, and violates the provisions of the property sections of the Constitution of the State of Ohio, and, in a case like the one at bar, creates a burden upon interstate commerce.

It was stated by the court that the language above excludes any attempt on the part of the State of Ohio, or its officers, to create a burden on interstate commerce. Were the wording of the statute changed, we could subscribe to the holding of the court. The change which we consider requisite would be the inserting of the words "issued common stock" instead of "authorized." However, as the statute is now constituted, we take issue with the Ohio Supreme Court's conclusion, for it cannot logically be said by anybody that unissued stock represents or could represent any sort of property, or any business transacted or to be transacted. The selling of its

own stock by a foreign corporation in another state is not considered as transacting business therein.

As the Legislature of the State of Ohio prescribes that a meaningless factor should be used in the computation of the fee, (*authorized* stock), the result is that the fee is computed by an unfair method. Were the statute interpreted or worded so that the fee would be chargeable upon that proportion of the issued stock representing property owned and business done in the State of Ohio, the amount of the same chargeable against the appellant corporation would be but One Thousand Eight Hundred and Eighty-one and Eighty-five Hundredths Dollars ($1,881.85), instead of Twenty Thousand Dollars ($20,000.00). The result of such unfair methods is that appellant corporation must pay a tax of approximately Eighteen Thousand One Hundred Dollars ($18,-100.00) more than it should be required to pay.

It is engaged in both intra- and interstate commerce, but more than two-thirds of its business is business in interstate commerce. That business must bear the brunt of the burden of paying such an excessive fee, and it is a substantial burden and not a remote or inconsequential one. Hence we submit that, even though the Legislature did, by the wording of the Act, seemingly intend to exclude burdening interstate commerce, it has, by the method of computation employed by the Act, created a terrific burden upon said commerce.

It is entirely possible for a statute to state on its face that the Legislature is not intending to burden interstate commerce, yet the statute may be so worded as to cause that result to be reached.

> "But it is said that none of the authorities cited are pertinent to the present case, because the state expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the telegraph

company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show. * * *" *Western Union Telegraph Co. vs. State of Kansas ex rel. Coleman, Attorney General,* 216 U. S. 1, 27, *speakirg through Justice Harlan.*

III.

Does the Statute Deprive Appellant of Property Without Due Process of Law?

The lower court dismisses this question at the end of a paragraph, page 40 of the Record, wherein nothing but the effect of the statute upon interstate commerce was discussed.

> "The statute in question does not offend the commerce clause of the constitution. In view of the conclusion thus reached, it is clear that the act properly construed does not deny to plaintiff *due process of law* and that plaintiff may not be taxed on its interstate business and on the proportion of its *authorized* stock represented by property owned and used and business transacted in other states." (*Italics ours.*)

We prefer to discuss this question under heading No. VI.

IV.

Does Section 8728-11 of the General Code of Ohio Deny to Appellant the Equal Protection of the Law?

The lower court answered the above question in the negative upon the theory that a state has the right to discriminate as between foreign corporations and domestic corporations, in respect to the amount of a franchise fee to be paid, Record, pages 41, 42 and 43. The general law is, that a state may even go so far as excluding foreign corporations from its borders. In the instant case, the State of Ohio did not exclude appellant from its borders, but by the invitations contained in the statutes of the State of Ohio, received appellant within its confines. All permit fees and its first franchise fee were paid and appellant thereupon was taken out of the class of foreign corporations and placed in another class, which should be termed "domesticated foreign corporations."

The Supreme Court, speaking through Justice Day, laid down as the law covering an identical situation in the case of *Southern Railway Company vs. Greene*, 216 U. S. 400, 416, 417, 418, the following:

> " • • • We have here a foreign corporation within a state, in compliance with the laws of the state, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business.
>
> • • • • •
>
> "We, therefore, reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is within the meaning of the Fourteenth Amendment a person within the juris-

diction of the State of Alabama and entitled to be protected against any statute of the state which deprives it of the equal protection of the laws.

"* * * It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. * * *

"It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state and other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position

to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the state, does violence to the Federal Constitution."

We do not understand that the holdings hereinabove set forth have been reversed by this court. However, we are fully aware that on some occasions distinctions have been drawn, due to peculiarities of the facts or the statutes involved in other cases. Appellant comes directly within the rulings of that case, in that its property located within the State of Ohio is of a very permanent nature. It is composed of two separate plants or factories, one of which, together with the real estate, is carried on the books of the company in the sum of One Hundred Forty Thousand Two Hundred Twenty-eight and seventy-three hundredths Dollars ($140,228.73). This plant was especially built by one of appellant's predecessor companies for the purposes for which it is now used. Within that plant are machinery, tools, patterns, fixtures, furniture and equipment of a value approximating One Hundred Twenty Thousand Dollars ($120,000.00). The second factory owned by appellant is carried upon the books of the company, together with the real estate upon which the buildings are situated, in the sum of One Hundred Twelve Thousand Five Hundred Thirty and Eighty-eight Hundredths Dollars ($112,530.88). Other property, exclusive of merchandise or materials in that factory, in the way of machinery, patterns, tools and dies, fixtures, etc., amounts to approximately One Hundred Thousand Dollars ($100,000).

The evidence shows that both plants are very well equipped for the purposes for which they are used, and adaptable to no other purpose without spending a large sum of money in changing machinery, tools, fixtures, etc., and that were either one of said plants placed upon the

market at the time of the bringing of this suit, or at any other time within the next two or three years, the plaintiff corporation could not realize anywhere near the value hereinabove set forth, which, the evidence shows, is a fair and reasonable value at the time. See affidavit of Lawrence G. Pierce, pages 24 and 25 of the Record.

This property is not of the nature of the property discussed in the cases of *Baltic Mining Company vs. Massachusetts,* and *S. S. White Dental Manufacturing Co. vs. Massachusetts,* 231 U. S. 68, or that concerned in the case of *Cheney Brothers Co. vs. Massachusetts,* 246 U. S. 147. It is of small comfort to appellant to be told by the lower court, in face of the record above mentioned and the positive sworn statements contained in the bill of complaint to the contrary, that (Page 44 of the Record):

> "• • • The investment in enterprises of like character must be large. The sale or leasing of factories such as the plaintiff owns for the production of the same, or allied, or different products in a thriving city, such as Toledo is, is not infrequent. *The Record does not suggest that the plaintiff will be by the franchise tax law subjected to the confiscation of its property, or to great or substantial loss,* or that its property is not readily salable at a reasonable price to other persons in the same or other kinds of business. Plaintiff's investment is not of the permanent character of those made by railroad or telegraph companies, but may be removed from one place to another and its equipment, when so transferred, put to a use like the present. • • •" (*Italics ours.*)

We call attention to the statement made by the court in its opinion, on page 36:

> "Plaintiff charges injunctive relief should be granted because the fee or tax assessed against it constitutes a cloud upon the title to its property, is erroneously computed, excessive, *confiscatory,* and • • • " *(Italics ours.)*

The bill of complaint contains the following language relative to confiscation of property:

> "That said law is unconstitutional in that it *confiscates plaintiff's property without compensation or due process* of law as prohibited by the Fourteenth Amendment to the Constitution of the United States of America, which provides:
>
> 'No state shall make or enforce any law which shall deprive any person of life, liberty or property without due process of law.'" *(Italics ours.)*

So that the court below was clearly in error when it stated that the Record did not suggest that appellant's property would be confiscated.

Assume that the property above mentioned of appellant corporation could be readily sold, which is contrary to the uncontroverted evidence in this case. Has not appellant other property which would be confiscated by its required removal from the state, and sale?

First, it has the name of the corporation as "Air-Way Electric Appliance Corporation." The words, "of Toledo, Ohio," are not a part of its corporate name. It can be assumed, although the record does not state, that this company had advertised its product, and in most advertisements it can be assumed that the location of the factories was given. Were the company required to move to another state, it would suffer great loss by reason of the fact of the loss of identity which the location of the concern gives to the product. Then, too, the use of the name itself may be preempted in such other states.

How many months of lost production would appellant suffer, were it forced to sell all of its property and move elsewhere?

It must be admitted that it would be a stupendous proposition to move such a vast amount of machinery, tools, etc., and that it would consume months and not weeks. What the loss would be under such circum-

stances, is problematical, of course, but, we submit, prohibitively heavy. It is not like moving such tools as would be moved in the ordinary garage or other like institution. Then, too, the cost of moving, we submit, would not be inconsequential. The Record shows that this corporation has in its employ from two to five hundred skilled workmen at times. This court cannot assume that there is no value connected with an organization doing the business which appellant company does, nor can it assume that appellant could move its organization or even the nucleus thereof elsewhere. It must be admitted that the loss of such an organization and the training of new people in a new locality would be tremendously expensive.

Of what avail is the equal protection of the law clause of the Fourteenth Amendment, if the cost and loss of selling or moving its plant and organization, etc., is so high as to require appellant corporation to abandon its parent state of choice and reform itself into an Ohio corporation? If such were the law, no corporation could do business beyond the confines of the border of the state of its creation, for, even though some other state might admit it to do business therein, there is no protection granted it by any provision of the Constitution of the United States, and all foreign corporations must cease to exist as such. And there would be nothing to prevent such other state from doing what Ohio did after the corporation was created, and increase the annual franchise fee by 400 per cent.

If this court is inclined to believe, in considering the case at bar, that the rule of law is that there can be discrimination in taxation between domestic corporations and domesticated foreign corporations, we submit that that discrimination cannot be such as will drive or force such domesticated foreign corporation from within the

confines of a state or to so burden that domesticated foreign corporation over and above the burden placed upon the domestic corporation that it cannot sell its product in competition with those domestic corporations competing against it.

We again respectfully submit that the salutary rule of law is the one laid down by this court in the case of *Southern Railway Company vs. Greene, supra.* We quote from the language of the late Chief Justice White in the case of *Western Union Telegraph Company vs. State of Kansas,* 216 U. S. 1, 50, 51:

> "• • • In other words, this case involves determining, not how far a state may arbitrarily exclude, but to what extent, after allowing a corporation to come in and acquire property, a state may take its property within the state without compensation upon the theory that the corporation is not in the state and has no property right therein which is not subject to confiscation. The difference between the premise upon which the proposition contended for rests and the situation here presented seems to me self-evident. I say this because my mind fails to perceive how the doctrine of election or voluntary assumption of an unconstitutional burden can have any possible application to a case like this. • • •
>
> " • • • If the unconstitutional burden be not assumed, *local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated.* If, on the other hand, the unconstitutional burden be borne, a like result takes place.
>
> "• • • *But I cannot assent to the correctness of the contention insofar as it asserts that the state may suffer a corporation to come into its borders, invest in property therein, and then, after having allowed, by acquiescence or implied invitation, such a situation to arise, the state may treat the corporation as if it had never come in and its*

property within the state as if it were wholly out of the state, and despoil the corporation of its rights and property upon such false assumption." (Italics are ours.)

Absolute equality and uniformity is impracticable, perhaps, in any known system of taxation, and if an approximation to equality is reached, a law might be declared constitutional. However, it has always been the law that inequalities that result from hostile discrimination and are not occasional or incidental in the operation of a general tax system, become obnoxious to the equal protection clause. There are no cases in Ohio involving Ohio statutes deciding that the system used for charging fees against domesticated foreign corporations as distinguished from domestic corporations, is constitutional. The system of charging a percentage on the amount of subscribed, issued and outstanding stock against domestic corporations, and a percentage on the amount of the proportion of the authorized stock as against foreign corporations, has been in vogue in Ohio, it is true, since 1894. However, the percentages charged varied from one-tenth of one per cent (1/10%) to three-twentieths of one per cent (3/20%), until the advent of stock without par value, when the charges upon stock without par value were fixed. They were first fixed at ten cents (10c) a share on the subscribed, issued and outstanding stock of a domestic corporation and one cent (1c) for each share of authorized stock of a foreign corporation. Later (and after appellant had established itself in Ohio), by the Act of 1921, 109 Ohio Laws 273, the rate was increased to five cents (5c) a share for the authorized stock of foreign and decreased to five cents (5c) a share for the issued stock for domestic corporations.

The court will observe that the amounts chargeable, on either plan of computation, on stock with par value,

because of the smallness of the multiplier, would be exceedingly small and so small, in fact, that no case can be found, as heretofore pointed out, wherein the question of the denial of the equal protection of the laws has been raised by the domesticated foreign corporation. Then, too, those percentages have only been raised to an extent of five mills on the dollar of authorized stock in the case of foreign corporations, and five mills on the dollar of the subscribed, issued and outstanding stock of domestic corporations. Thus, the reason is apparent why no corporations have heretofore assailed this system of taxation.

The lower court holds that since this same *plan* of computation was in effect at the time appellant corporation was admitted to do business in the State of Ohio (although under that plan its fee was only twenty per cent (20%) of the fee assessed under the amended statute), it is now estopped from claiming such a system as being unconstitutional. We respectfully submit that no such holding can be sustained by the authorities. (See the language of the late Chief Justice White, above quoted.) *Western Union Telegraph Co. vs. State of Kansas, ex. rel. Coleman*, 216 U. S. 1, 50, *supra.*

Another reason given for the court's holding that there can be no claim of violation of the provision in respect to the equal protection of the laws, is that the plaintiff voluntarily created and maintains the position in which it has found itself, to-wit: what the court refers to as "improvident capitalization." There is no contention but what appellant went into court with clean hands, nor that it was trying to do other than equity. It did not go into court for the purpose of being told how to manage its own affairs. It has been the law, from the time that memory of man runneth not to the contrary, that a court of equity will not assume the responsibility of man-

aging a corporation or of guiding its affairs, except through one of its own officers, or under circumstances of fraud.

When it came into Ohio, appellant paid to the State of Ohio, in conformity with the statute then in force, Four Thousand Dollars ($4,000.00) for the privilege of doing its first year's business within that state. It is now ordered by the state authorities to pay the State of Ohio Twenty Thousand Dollars ($20,000.00) for carrying on that same business. The State of Delaware created appellant corporation into a citizen of its own. The State of Delaware did not object to giving appellant authority to issue four hundred thousand (400,000) shares of its stock. The State of Ohio did not object, upon the admission of the corporation to do business within the State of Ohio, to the fact that it had four hundred thousand (400,000) shares of non par value stock. Nor does the State of Ohio, at this time, object to the capitalization of the company.

It might be assumed that the organizers of this company were reasonably sane and prudent men. The inference is, in the Record, that this corporation's holdings resulted from a purchase or a merger of other corporations. It cannot be called imprudent, nor can its managers be classed as unbusinesslike, because they have been looking forward toward the future. Perhaps the merger or amalgamation with companies manufacturing other household electric appliances is contemplated. It should not be condemned for holding on to all of the authority extended to it by the state of its creation.

The constitutions of the State of Ohio and the United States were enacted for the purpose of protection. The Supreme Court of the United States, speaking through Mr. Justice Pitney in the *Ohio Tax Cases,* 232 U. S. 576, 589, referring to a decision of the Supreme Court of the

State of Ohio in the case of *Southern Gum Co. vs. Laylin*, 66 Ohio State 578, said as follows:

> "An examination of the state decisions cited in the Laylin case with others referred to in the opinion of the District Court, and in the briefs of counsel, convinces us that the District Court was correct in its conclusion that the state court, in the Laylin case, dealt with a general law and its operation on all corporations of given classes throughout the state, and not with its effect upon specific financially weak corporations; that it was not intended to hold that the courts as final arbiters might overthrow a law imposing a tax on privileges and franchises merely because in isolated cases such law might impose a hardship, but only that those excise laws whose general operation is confiscatory and oppressive are unconstitutional."

We submit that the general operation of the law in question is confiscatory and oppressive. It cannot be successfully contended that every foreign corporation, or that the majority of foreign corporations doing business within the State of Ohio, or corporations generally throughout the country, have issued all of the stock which they have authorized. It is the known practice of corporations to have unissued, large amounts of stock, the amounts varying with the purposes to which it is ultimately intended to be put. The record does not disclose, and it could not properly disclose, how many foreign corporations having stock without par value have been admitted to do business in Ohio, nor the amounts of unissued stock. There must be many foreign corporations doing business in Ohio either with stock of par value or stock without par value, who own all of their property in the State of Ohio. This is not an incidental case. It is a case which might reasonably be expected to arise at any time or to have already arisen in the State of Ohio. A similar condition arose in the case of *Hump*

Hair Pin Co. vs. Emmerson in Illinois Supreme Court Reporter Advance Sheets May 1, 1923, page 305. This case was filed prior to the first of December, 1921, at which time the fee was supposed to have been paid. No other cases have been started to our knowledge. We are sure we are not wrong in assuming that there are many other foreign corporations finding themselves in identically the same position in which appellant has found itself, which are awaiting the outcome of this case.

We respectfully submit that there is a real and hostile discrimination which amounts to a violation of the equal protection clause of the Constitution of the United States, apparent in this case.

V.

Is Section 8728-11 Unconstitutional Because of the Inequality of Its Burdens Between Foreign and Domestic Corporations and Between Different Domesticated Foreign Corporations?

By inference the lower court answered this question in the negative, for the law was upheld as constitutional and there was no discussion as to the difference in rate charged a domesticated foreign corporation having par value stock and a domesticated foreign corporation having non par value stock. The question as to the inequalities between domesticated foreign corporations and domestic corporations has been treated under the preceding head. We contend that there is a hostile discrimination between domesticated foreign corporations having par value stock and those having stock without par value. The one is charged three-twentieths of one per cent (3/20%) *upon the proportion of its issued authorized stock* and the other five cents (5c) a share *upon the pro-*

portion of its authorized stock. It can be assumed, without violence, that a corporation having par value stock has received approximately the equivalent to the par value of its shares for the same. The Supreme Court of the United States, speaking through Justice Bradley, *Bells Gas Railroad Co. vs. Pennsylvania,* 134 U. S. 232, says:

> "The presumption is that corporate securities are worth their face value."

Therefore, the tax on each one hundred dollars par value of stock of a domesticated foreign corporation having stock with par value, is fifteen cents. There can be no presumption as to the value of non par stock, except it can be presumed that it has a value, merely. Its value may range from one dollar or below, to one thousand dollars, or ten thousand dollars, or any other amount. It is likely there are domesticated foreign corporations having stock of the value, for instance, of seven dollars per share, as happens to be the value fixed by the State of Ohio at which the appellant might dispose of its stock, and like corporations with stock selling at one hundred dollars per share. It is not just and it is not reasonable to tax a corporation which cannot sell its stock at more than seven dollars on a basis of five cents a share and then allow domesticated foreign corporations with par value stock of one hundred dollars to pay only a tax of fifteen cents per share and, we submit, it is not constitutional to charge appellant corporation or to require appellant corporation to pay a fee of five cents a share on the stock at its fixed value, when another domesticated foreign corporation having stock without par value may pay only five cents a share on stock worth one hundred dollars or more.

We submit that such a law is in violation of the equal protection of law clause of the Constitution of the

United States, that it amounts to the taking of property without due process of law, and that it is contrary to the property provisions of the Constitution of the State of Ohio in that its private property does not remain inviolate.

VI.

Does Section 8728-11 Violate the Provisions of the United States and Ohio Constitutions Relative to the Taking of Private Property?

This question, which the court answered in the negative, has been partially discussed under previous headings. We refer the court to a statement in the opinion of the District Court, Record, page 44, which has not heretofore been called to its attention:

> "Prudent managers of foreign corporations doing business in Ohio will have no occasion to charge in good faith that the statute is confiscatory or denies their companies the equal protection of the laws."

We have heretofore commented on this phase of the opinion of the court below and have also pointed out that the court, on page 44, says in substance that there is no complaint made as to the confiscation of its property. In addition to the evidence on that question heretofore pointed out, we call attention to "Exhibit A" attached to the affidavit of S. E. Forney, Record, pages 30 and 31, wherein a representative of the appellant, in a letter to the Tax Commission of the State of Ohio, said as follows:

> "You of course fully realize that the assessment of a tax in the amount of $20,000.00 upon a company of this kind, is confiscatory and unreasonable."

We therefore respectfully submit that the result of the provisions of Section 8728-11 is a deprivation of the private property of appellant corporation, and that the record so shows.

VII.

Second Opinion of the District Court.

The District Court in its first opinion, announced that it would hold jurisdiction of the case at bar until such time as the plaintiff made a new application to the Tax Commission of the State of Ohio for the purpose of obtaining the right to amend the original report as made in accordance with the contentions of appellant, to-wit, that part of its business was business transacted in interstate commerce. Pursuant to the suggestions of the court, the appellants did file with the Tax Commission a new application for leave to amend its report. (Record, pp. 16-17.) The Tax Commission, having denied that it had any jurisdiction over the matter at that time, refused appellant the right to amend said report. Thereupon appellant filed a supplemental bill of complaint setting forth the facts, which came on for hearing before the court, and the District Court found that the Tax Commission should have granted the right to appellant to amend its report, but inasmuch as the Tax Commission had denied that right, the court proceeded to determine the amount of the authorized stock which represented appellant's business done in interstate commerce and figured the fee due the State of Ohio accordingly. After completing its discussion of the above mentioned matter, the court stated in its opinion as follows:

> "The plaintiff contends that we held, in our former opinion, a statute constitutional which taxes a domesticated foreign corporation with 400,000 shares of non par value common stock, of

> which but 50,485 shares are subscribed, issued and outstanding, a franchise fee of $20,000 and a domestic corporation with identically the same number of shares of stock authorized and outstanding
>
> a fee of $2534.25. The opinion warrants no such conclusion. The plaintiff voluntarily entered the state for the transaction of business. * * *" (Record, page 55.)
>
> "* * * The plaintiff asks the court to relieve it from an anomalous situation which it voluntarily and improvidently created. * * *" (Record, page 57.)

We repeatedly called that court's attention to the fact that at the time appellant entered the state, its annual franchise fee was only Four Thousand Dollars ($4000.00), which it was entirely satisfied to pay.

We have also heretofore, under appropriate headings, discussed the right of a court of equity to manage or direct the affairs of a corporation and deny equity to a corporation which has complied not only with all of the laws of the state of its nativity or creation, but all of the laws of the state of its domestication.

We submit that as long as appellant corporation came into court with clean hands, has done and is doing equity, a court of equity has no right to deprive it of the protective provisions of the Constitution of the United States and of the State of Ohio. We believe that the court will take judicial notice that practically all corporations are incorporated with more authorized shares than are immediately to be issued. There is nothing in business or morals which forbids this usual procedure. We have examined the analysis of the financial statements of fifty corporations, contained in the first fifty pages of Poor and Moody's Industrial Corporation Manual, under date of 1923, and find that more than eighty per cent of all of the corporations listed upon those pages

have more authorized stock than issued. This supports our contention that appellant corporation has pursued only the natural course in its capitalization.

VIII.

The State of Ohio, If Not in Fact, Did Practically Fix the Value of Appellant's Stock.

Appellees' contention in their brief is that the State of Ohio did not fix the value of appellant's shares of stock through its Securities Department. Literally, this is true. However, the state did issue a certificate allowing the sale of the stock at seven dollars per share, after making the findings prescribed in Section 6373-16 of the General Code of Ohio, that appellant's business was not fraudulently conducted, that the terms of disposal were not grossly unfair, and that it was solvent. Logically, the corporation would not sell its stock for much less than it was worth, nor would the state allow the corporation to sell the same for more than it was worth. Applying common sense and reason to the facts, the result is attained that the State of Ohio had in one of its departments facts which showed a value of appellant's stock satisfactory to that State Department and to the corporation, yet in fixing the privilege fee, the same state overlooks or sets aside that which must necessarily be an approximation of the true value and considers only an arbitrary value. As foreign corporations having par value stock are charged fifteen cents on each hundred dollars par value and a non par value foreign corporation with shares of the value of seven dollars each, is in effect charged on a basis of an arbitrary value of thirty-three and one-third dollars per share, we submit, this amounts to confiscation of property in violation of the Fourteenth Amendment of the Constitution of the United

States and the provisions of the Preamble of the Constitution of the State of Ohio that private property shall forever remain inviolate, and a denial of the equal protection of the laws.

CONCLUSION.

We submit that this statute is unconstitutional offending both the Constitution of the United States and the State of Ohio, because its operation results in a charge made against a domesticated foreign corporation for the annual privilege of doing business within the State of Ohio of the sum of Twenty Thousand Dollars ($20,000) and against an identical domestic corporation engaged in the same line of business, for the same privilege, of but Two Thousand Five Hundred Thirty-four and Twenty-five Hundredths Dollars ($2,534.25); that the system used by the State of Ohio in charging a domestic corporation upon subscribed, issued and outstanding common stock and a domesticated foreign corporation upon authorized common stock, is unconstitutional; that the fixing of an arbitrary charge on non par value stock, without any reference whatsoever to the value of the same, is violative of the provisions of both the Constitution of the United States and of Ohio, and that a direct burden is placed upon interstate commerce.

For the foregoing reasons and for the other reasons assigned in appellant's original brief and in this, its reply brief, we submit that appellant was and is entitled to an injunction restraining the various officers of the State of Ohio from collecting any tax under Section 8728-11.

BRIEF FOR APPELLEE IN CASE NO. 267.

ARGUMENT

In answering the brief of appellants (state officers) in case No. 267, we will discuss the following propositions in the orders named:

1. A Court of Equity has the right to correct a mistake made by the taxpayer in reporting its property for taxation.

2. The words "business transacted," as used in Sections 5499, 5503 and 8728-11 of the General Code, do not include the manufacturing costs of products sold in interstate commerce.

3. Power of Supreme Court to consider question not raised by pleading or evidence.

I

A Court of Equity Has the Right to Correct a Mistake Made by the Taxpayer in Reporting Its Property for Taxation.

At the time of the filing of the original return, the corporation reported that all of its business was handled from Ohio and gave the amount thereof as Two Hundred Fifty Thousand Five Hundred Ninety-four and fifty-eight hundredths Dollars ($250,594.58). Later, an application was made to the Tax Commission to allow the corporation to correct its return so that it would reflect truly the business done in the State of Ohio, which amounted to Seventy Thousand Six Hundred Two and thirty hundredths Dollars ($70,602.30), and the balance represented the amount of business done in interstate commerce. The power of the court in the proper case to order the correction of such a return or to correct the

return, cannot be successfully disputed, nor can it be said that the corporation is estopped from requesting such correction. *City of Wilmington vs. Ricaud,* 90 Fed. 214, C. C. of A. 4th C; *Brown vs. French,* 80 Fed. 166, C. C. Mont.; *Wells-Fargo and Co. vs. Johnson,* 205 Fed. 60, 76; *Cooley On Taxation,* Volume II, page 1447; *City of Charlestown vs. County Commissioners,* 109 Mass. 270; *Dunnell Manufacturing Co. vs. Inhabitants of Pawtucket,* 73 Mass. 277; *Town of Clinton vs. Town of Haddon,* 5 Conn. 84; *Chicago, Etc. Railroad Company vs. Auditor General,* 18 N. W. (Mich). 536; *C. B. & Q. R. R. vs. Cass County,* 51 Neb. 369; *Hump Hairpin Manufacturing Co. vs. Emmerson,* 258 U. S. 290.

It is contended that the District Court was in error in reducing the tax as assessed from Twenty Thousand Dollars ($20,000.00) to Fourteen Thousand Nine Hundred Twenty-six Dollars ($14,926.00) upon the ground that One Hundred Seventy-nine Thousand Ninety-two and twenty-eight Hundredths Dollars ($179,092.28), represented the amount of business done in interstate commerce and in figuring the amount of authorized stock represented by property owned and business done, the above amount should be excluded. If the statute under which this fee was assessed is constitutional, we submit that the court properly figured the tax so that in the court's opinion, no burden was placed upon interstate commerce and the court was not in error in holding the corporation was not estopped from correcting its return. *Hump Hairpin Manufacturing Co. vs. Emmerson, supra; Looney vs. Crane,* 245 U. S. 178.

II

The Words "Business Transacted", As Used in Sections 5499, 5503 and 8728-11 of the General Code, Do Not Include the Manufacturing Costs of Products Sold in Interstate Commerce.

It is contended for the first time that the lower court, in refiguring the tax, should have considered the cost of manufacturing the articles which were sold in interstate commerce and that the words "business transacted in Ohio" contemplated the inclusion of such manufacturing cost. No such question is raised by the pleadings, nor was any evidence of any kind introduced in the court below by the state officers showing that such an interpretation of the statute was within their minds.

It is conceded by counsel for the cross appellant that a fee of Twenty Thousand Dollars ($20,000.) against the corporation could not be sustained, as there would be a direct burden placed upon interstate commerce by such a charge, under the tax system in vogue in Ohio. The complaint is that the fee, as computed by the lower court, amounting to Fourteen Thousand Nine Hundred Twenty-six Dollars ($14,926.00), is not sufficient and they endeavor now, for the first time, to have a rule of law laid down by which the state will receive a sum of money in excess of that fixed by the court, but less than the Twenty Thousand Dollars ($20,000).

An examination of the printed report which was given to the appellant corporation by the state officers for the purpose of making its return thereon, following Record page 28, does not bear out the present contention. Question 19 asks the amount of business transacted in Ohio during the preceding twelve months was..... Dollars ($.....). Question 23 asks, the amount of

business transacted outside of Ohio during the preceding twelve months was.....Dollars ($.....). There is nothing said any place in the report that manufacturing costs were to be considered. Information as to manufacturing costs was neither requested by the Tax Commission prior to the determination of the tax nor at the time the application for a refiguring of the tax was made. Clearly, the corporation had a right to the benefit of the Tax Commission's settled policy of measuring business transacted by sales, and to now apply a different and more burdensome method would constitute such arbitrary action as offends the equal protection of the laws clause of the Federal Constitution. *Sioux City Bridge Company vs. Dakota County, Neb.*, 43 Sup Ct. Rep. 190; *Sunday Lake Iron Co. vs. Wakefield Township*, 247 U. S. 350, 352, 353; *Raymond vs. Chicago Union Traction Co.*, 207 U. S. 20, 35, 37; *Baker vs. Druesdow*, 68 L. Ed. Op. 53, 55.

It must be presumed that the Legislature intended to lay down a workable rule for the determination of the amount of business transacted by a corporation and, as stated in *State of Ohio vs. Cabin Creek Consolidated Coal Company*, 17 Ohio *Nisi Prius* (N. S.) 60, 63, a rule which "leaves no possible opportunity for the exercise of any discretion by the taxing body." Taking "sales" as the measure of the business transacted is not only easy of application, but affords a basis which can be applied with uniformity and without the exercise of discretion by the Commission. Taking business transacted to include "cost of manufacture" necessitates an extended inquiry into the accounting methods of each corporation and must at best result in an arbitrary division of the sales receipts.

As pointed out in *American Manufacturing Co. vs. St. Louis*, 250 U. S. 459, the case of an annual franchise

for the privilege of continuing to do business within the state is clearly distinguishable from cases where a small fee is charged for the privilege of carrying on a manufacturing enterprise and where the sole basis for the tax is the business transacted. Here, the tax is based, not only upon the business transacted, but also upon the property owned and used, and is not a manufacturing tax.

Even, however, if the statute were open to the construction contended for, the practical effect would be to burden interstate commerce and would come within the ban of the many authorities holding that if the operation and effect of a state law is a burden upon interstate commerce, it is invalid, regardless of the form of the act. *St. Louis Southwestern Railway Co. vs. Arkansas,* 235 U. S. 350, 362; *Mountain Timber Co. vs. Washington,* 243 U. S. 219, 237; *Crew Levick Co. vs. Pennsylvania,* 245 U. S. 292.

Further, such a construction would not obviate the features of the law under which the tax is levied rendering it in contravention of the equal and due process clauses of the Federal Constitution, which are discussed in our brief in support of the Air-Way Corporation's appeal.

III

Power of Supreme Court to Consider Question Not Raised by Pleading or Evidence.

The question presented by the brief of the state officers was not raised by the pleadings nor was any evidence taken upon any such issue as to manufacturing costs and we submit that at this late day this court should not reverse this case for the purpose of allowing the officers of the State of Ohio to change the issues therein

and take evidence upon a matter not raised by the pleadings. The action which the officers of the state desire this court to take is not supported by the decisions cited in their brief. The following excerpt from the opinion of Mr. Justice McKenna in *Thomas vs. Taylor*, 224 U. S. 73, 84, is pertinent:

> "Besides judgment cannot be reversed upon the mere suggestion that upon some other theory than that upon which the case was tried, evidence might have been introduced which might have changed the result."

Rodriguez vs. Vivoni, 201 U. S. 371, 377;
New York, Lake Erie and Western Railroad Co. vs. Estill, 147 U. S. 591, 614;
Pacific Railroad of Missouri vs. Ketchum, 95 U. S. 1, 3.

CONCLUSION.

We respectfully submit that should this court hold Section 8728-11 of the General Code of the State of Ohio constitutional, the decree of the District Court should be affirmed in so far as it holds that the amount of the tax in excess of Fourteen Thousand Nine Hundred Twenty-six Dollars ($14,926.00) is invalid.

Respectfully submitted,

THOMAS H. TRACY,
GEORGE D. WEILES,
NEWTON A. TRACY,
Solicitors for Appellant in Case No. 266 and for Appellee in Case No. 267.

IN THE

Supreme Court of the United States

October Term, A. D. 1923

No. 266

AIR-WAY ELECTRIC APPLIANCE CORPORATION,

Appellant,

vs.

HARRY S. DAY, TREASURER OF THE STATE OF OHIO, JOSEPH T. TRACY, AUDITOR OF THE STATE OF OHIO, JOHN R. CASSIDY, C. E. FORNEY, C. A. HORN, AS THE TAX COMMISSION OF THE STATE OF OHIO, AND THAD H. BROWN, SECRETARY OF THE STATE OF OHIO,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This cause comes to this court on appeal from an order sustaining the constitutionality of an Ohio statute imposing an annual franchise fee upon foreign corporations and denying a temporary injunction against its enforcement. Appellant, Air-Way Electric Appliance Corporation, is a corporation organized under the laws of Delaware, with an authorized capital stock of Four Hundred Thousand (400,000) shares without nominal or par value. (Record page 1 and 2). Fifty Thousand Four Hundred and Eighty-five (50,485) shares only were issued and outstanding at the time the fee in question was computed. (See Record page 35.)

At the time of its admission to do business within the State, in September of 1920, the value of the stock was fixed by the "Blue Sky" Commission of Ohio at Seven Dollars ($7.00) per share. (Record pages 2-3). All of its issued capital stock was sold at that price and the proceeds of approximately Three Hundred Fifty Thousand Dollars ($350,000) represents the corporation's total capital investment within the State.

A license fee of Four Thousand Fifty Dollars, ($4,050) was paid at the time of its entry into the State for the privilege of doing business in accordance with General Code Section 8728-1 and Sections 178, 179 and 180 (Record page 2).

Two specially constructed and equipped factory buildings were acquired in Toledo, Ohio, adapted to the manufacture and production of its products, consisting of electric sweepers, washers and sundry electric appliances, which said factories could not be disposed of except at a great loss. (Record, page 24-25.) From two to five hundred workmen and artisans were employed in these factories in manufacturing the articles above mentioned (Record page 25), which were sold to jobbers and dealers throughout the United States and foreign countries (Record page 23, 26 and 27). For this purpose a force of traveling salesmen was maintained who procured the orders from the customers at their places of business in the various states. The goods were then manufactured in the factories in Ohio and sent from them to customers or warehouses, some of which were located outside of the State, and payment was received by draft or check. (Record pages 2, 13, 23, 26, 27).

The appellant was at all times engaged in severe and very active competition with several domestic corporations in each and every line of its endeavors. (Record page 1, 43.)

The appellant is now and was at all times willing to pay to appellees any and all taxes which are justly found due and owing.

The following provisions of the General Code of

Ohio relating to the annual franchise fees payable by corporations, were in effect at the time of its admission and at the time the fee was computed:

> "Section 5499: *Foreign corporations Report.* —Annually, during the month of July, each foreign corporation for profit, doing business in this state, and owning or using a part or all of its capital or plant in this state, and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing to the commission in such form as the commission may prescribe."

Section 5501 provides the information required to be set forth in the report.

Section 5503 provides for the annual fee required of foreign corporations having stock *with* par value, and is as follows:

> *Collection: fee: minimum.*—On or before October fifteenth, the auditor of state shall charge for collection, as herein provided, annually from such company, in addition to the initial fees otherwise provided for by law, for the privilege of exercising its franchises in this state, a fee of three-twentieths of one per cent upon the proportion of the *authorized capital stock* of the corporation, represented by property owned and used and business transacted in this state.

which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of State on or before the first day of the following December." (Italics ours.)

Section 5498 provides for the fee payable by domestic corporations having stock *with* par value, and is in part as follows:

"On the first Monday in August, the commission shall certify the amount so determined by it to the auditor of state, who shall charge for collection, on or before August fifteenth, as herein provided, from such corporation, a fee of three twentieths of one per cent. upon its *subscribed or issued and outstanding capital stock*, which fee shall not be less than ten dollars in any case." (Italics ours.)

Section 8728-11 as amended in February of ~~1919~~ 1920, 108 O. L., Part 2, 1287, provides for the fee payable by domestic and foreign corporations having stock *without* par value and is in part as follows:

"The amount of fees payable under section 5498" (domestic corporations) "by corporations formed or organized under this act shall be three-twentieths of one per cent. upon its subscribed or issued and outstanding preferred stock, plus *ten cents* for each share of common

stock, without par value, *subscribed or issued and outstanding*, but not less than ten dollars in any case.

"The amount of fees payable by a *foreign* corporation having stock without par value under section 5503" (foreign corporations) "shall be three-twentieths of one per cent. upon the proportion of the authorized preferred stock represented by property owned and used and business transacted in this state, and *one cent* for each share of *authorized common stock* without par value, but not less than ten dollars in any case." (Italics ours.)

Section 8728-11 was again amended by the act of May 17, 1921, 109 O. L. 273, to read as follows:

"The amount of fees payable under section 5498 by a corporation formed or reorganized so as to have common stock without par value shall be three-twentieths of one per cent. upon its subscribed or issued and outstanding preferred stock plus *five cents* for each share of common stock, without par value, *subscribed or issued and outstanding*, but not less than ten dollars in any case.

"The amount of fees payable by a *foreign* corporation having common stock without par value under section 5503 shall be three-twen-

tieths of one per cent. upon the proportion of the authorized preferred stock represented by property owned and used and business transacted in this state and *five cents* per share upon the proportion of the number of shares of *authorized common stock*, represented by property owned and used and business transacted in this state, but not less than ten dollars in any case." (Italics ours.)

In July of 1921 the report required by section 5499 was duly fi'ed by appellant, (Record page 3). This report showed property of the then value of Four Hundred Fifty-eight Thousand Two Hundred Seventy-eight Dollars ($458,278) owned by appellant, all of which was located within Ohio. (Record, Exhibit No. 2, following page 28.) Business was transacted during the preceding year in the amount of Two Hundred Fifty Thousand Five Hundred Ninety-four Do'lars ($250,594) all of which was stated to have been handled from Ohio. (Record, Exhibit No. 2, following page 28.) Upon the basis of this report a tax bill was rendered by the Treasurer of State to appellant for Twenty Thousand Dollars ($20,000), which upon its face is stated to have been computed in accordance with section 5503 of the Genera! Code, but which was obviously computed under section 8728-11 as amended by the act of May 17, 1921. (Record Exhibit No. 1 following page 28.)

In figuring the fee the entire property and business of the corporation was considered as being owned and having been transacted within the State. The tax was in fact computed at five cents per share on the entire 400,000 shares of *authorized* stock.

A protest against the amount and validity of the tax was made by letter and personal interview to the Tax Commission in which it was stated that a large portion of the business transacted was outside of Ohio. (Record page 28-29.) The Commission refused to grant a reduction of the tax or an opportunity to amend the report to show the business alleged to have been transacted outside of the State. (Record page 29.)

On December 9, 1921, the present suit was instituted in the District Court for the Southern District of Ohio, Eastern Division, in which a temporary injunction against the collection of the tax was sought upon the grounds, among others that section 8728-11 and section 5503 of the General Code were in contravention of the due process and equal protection clause and commerce clause of the Federal Constitution and in violation of Section 2, Article 12, and Section 29, Article 2, and Section 28, Article 2, and Article 1 of the Constitution of the State of Ohio and Article 1 of The Bill of Rights to the Ohio Constitution.

Upon a hearing before Judges Donahue C. J., Sater and Peck, D. Js., reported 279 Fed. 878, it was decided

that none of the constitutional objections urged were valid; but the bill was retained pending an application for rehearing to the Tax Commission in order that any errors as to the amount of business transacted within the State could be corrected and the tax assessed on the basis of the amended return. Thereafter such an application was filed, reciting that the business transacted in Ohio should have been stated to be Seventy Thousand Eight Hundred Two and 30-100 Dollars ($70,802.30) instead of Two Hundred Fifty Thousand Five Hundred Ninety-four and 58-100 Dollars ($250,594.58), as set forth in the original report and that the business transacted outside of Ohio should have been stated to be One Hundred Seventy-nine Thousand Seven Hundred Ninety-two and 28-100 Dollars ($179,792.28) making the aggregate of the property owned, and business transacted, in Ohio Five Hundred Twenty-eight Thousand Eight Hundred Eighty and 86-100 Dollars ($528,880.86) in place of Seven Hundred Eight Thousand Five Hundred Eighteen and 56-100 Dollars ($708,518.56). (Record page 19.)

The application was denied by the Tax Commission upon the ground that it had no jurisdiction to entertain an application more than sixty (60) days after the certification of the amount of the tax to the Auditor of State. (Record page 17.)

An amendment and supplement to the bill of complaint was filed April 6, 1922 setting forth the fact of the

application and its denial by the Tax Commission. (Record page 16.) Upon consideration a majority of the Court found that the correction sought should have been allowed, and that a tax based on the entire business transacted would be an unconstitutional interference with interstate commerce. The Tax Commission and other state officials were enjoined from collecting or attempting to collect a tax greater than Fourteen Thousand Nine Hundred Twenty-six Dollars ($14,926) which is the amount of the tax as computed on the basis of the amended report in accordance with the rule provided by Section 8728-11 as amended by the act of May 17, 1921. (Record page 54.)

Air-Way Electric Appliance Corporation appeals from the portion of the decree denying the full relief prayed for by it, upon the ground that the law under which the fee was assessed is unconstitutional. A cross appeal has also been taken by the State from the portion of the decree enjoining the collection of the tax in excess of that computed on the basis of the amended report. The grounds for appellant's appeal only will be discussed in this brief.

ASSIGNMENT OF ERRORS

The plaintiff prays an appeal from the interlocutory order of the Court below, made and entered herein on the 24th day of February, 1923, to the Supreme Court of the United States and assigns for error:

First. Said court erred in finding that Sec. 8728-11 of the General Code of Ohio is not in contravention of the Constitution of the United States, especially of the equal protection and due process clauses of Sec. 1, Art. XIV.

Second. The said court erred in finding that Secs. 5503 and 8728-11 of the General Code of Ohio are not in contravention of the Constitution of the United States, especially of the equal protection clause of Sec. 1, Art. XIV, and the privilege and immunity clause of Sec. 2, Art. IV.

Third. Said court erred in finding that Secs. 5503 and 8728-11 of the General Code of Ohio are not in contravention of the Constitution of the United States, especially of the interstate commerce clause of Sec. 8, Art. I.

Fourth. The said court erred in finding that Sec. 8728-11 of the General Code of Ohio is not in contravention of the Constitution of Ohio especially of the retroactive clause of Sec. 28, Art. II and Art. I of the Bill of Rights.

Fifth. The said court erred in finding that Secs. 5503 and 8728-11 of the General Code of Ohio are not in contravention of the Constitution of Ohio, especially of the uniform rule clause of Sec. 2 Art. XII.

Sixth. The said court erred in determining the tax at the rate of five cents (5c) per share on the proportion of the authorized capital stock without par value, represented by property owned and business transacted within this state without regard to its true value or its value as determined by the Securities Commission of Ohio.

Seventh. The said court erred in not granting a temporary injunction against the collection of any part of the tax as assessed.

PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES AND OF THE STATE OF OHIO INVOLVED

First. Section 1, Fourteenth Amendment to the Constitution of the United States:

> "nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Second. Section 8, Article 1 of the Constitution of the United States:

> "Congress shall have power******to regulate commerce******among the several states."

Third. Section 2, Article 1 of the Bill of Rights of the State of Ohio:

> "All political power is inherent in the people

Government is instituted for their equal protection and benefit******."

Fourth. Section 2, Article 12 of the Constitution of the State of Ohio:

"Laws shall be passed taxing by uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise and also all real and personal property according to its true value in money******."

Fifth. Section 19, Article 1 of the Bill of Rights of the Constitution of the State of Ohio:

"Private property shall ever be held inviolate but subservient to the public welfare******."

Sixth. Section 28, Article 2 of the Constitution of the State of Ohio:

"The general assembly shall have no power to pass retroactive laws, ******".

ARGUMENT

1.

The Basis Taken for the Computation of the Annual License Fee Bears No Relation to the Value of the Privilege Conferred

The court will observe we are not concerned with the initial or admission fee charged against foreign corporations for the privilege of coming into the state, but

rather with the secondary fee charged for the annual privilege of carrying on business within the state. However drastic the power of a state may be concerning the former, in respect to the latter it is well settled that the fee which may be charged a foreign corporation is limited by certain provisions of the Constitution of the United States, to-wit: Interstate commerce, due process of law, and equal protection of the laws clauses; likewise there are certain provisions of the Constitution of Ohio and the Bill of Rights beyond which such a law cannot go, to-wit: Private property shall ever remain inviolate but subservient to the public welfare—the equal protection clause and the common welfare provision *supra*.

The Supreme Court of Ohio in the case of *Southern Gum Co. v Laylin*, 66 O. S. 578, had under consideration a portion of our present corporation tax law as applied to domestic corporations having stock of a designated par value, whereby a fee was charged upon the number of subscribed, issued and outstanding shares of stock. The Court, speaking through Burkett, J., said:

> "While there is no express limitation upon the power of the general assembly to tax privileges and franchises, such power is impliedly limited by those provisions of the constitution which provide that private property shall ever be held inviolate, but subservient to the public welfare, that government is instituted for the equal protection and benefit of the

people, and that the constitution is established to promote our common welfare.

"By reason of these limitations a tax on privileges and franchises can not exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value thereafter. The determination of such values rests largely in the general assembly, but finaliy in the courts."—(Syl.)

The privilege which appellant corporation has enjoyed for one year in Ohio was to use and own property of the value of $458,278 upon which it must pay the usual property taxes, and to do business in the state to the extent of $70 802.30. (Record pages 16 and 17.) The lower court fixed the fee chargeable for the year 1921 at $14 926.00. Such a fee, when considering the privileges conferred is far above the continuing value thereof and is unreasonable and in fact confiscatory.

The basis upon which the tax is computed bears no relation to the value of the privilege conferred. First, it takes the proportion of the number of shares of *authorized* stock represented by property owned and used and business done within the state, and, second, it multiplies that number by an arbitrary figure of five cents.

An initial fee based upon the authorized stock is usual, both when a new domestic corporation is formed and when a foreign corporation becomes domesticated.

Beyond that any fee for the privilege of carrying on business based upon *authorized* stock, unless it is reasonably limited in its maximum amount, is an anomaly, and unjustifiable.

Until appellant has sold all of its stock, to-wit: 349,515 shares more at $7.00 per share, the annual privilege which it enjoys to do business in this state is as a matter of fact, necessarily limited by the amount of its *issued* stock. If more stock is issued during any year it would be so reported the next year. The annual charge is computed not upon the *issued* stock but upon the *authorized* stock including both issued and unissued upon the number of shares of its authorized stock represented by property owned and business transacted for the preceding twelve months and is a charge in advance for the following year. Unissued stock, however, represents nothing and can have no relation to property owned or business transacted. Hence a fee computed on such a basis is unreasonable and unjust.

Various methods of computation have been used by different states. New York, for example takes the proportion which the corporation's actual capital employed within the state bears to its entire capital. Other states take the proportion of the subscribed or issued capital stock represented by property owned within the state: while another method used is to measure the fee by the business transacted within the state. It will be noticed

that in each of these methods the basis taken is indicative of the value of the privilege conferred. This is accomplished directly under a plan where the actual capital employed within the state is taken, and indirectly where the *issued* stock represented by the capital employed within the state is used.

When a basis of taxation is taken which does not reflect the value of the privilege sought to be taxed, there is a want of due process of law and a denial of the equal protection of the law. This is well illustrated by the situation presented in *Looney vs. Crane Co.*, 245 U. S. 178, and *International Paper Co. vs. Massachusetts*, 246 U. S. 135. 142 in which it is held that an annual franchise tax upon a foreign corporation measured by all of its property and business is unconstitutional, for the reason that the value of the exercise of a corporate franchise within the state is not indicated by its entire business and property transacted and owned.

The charge of five cents a share upon each share of *authorized* stock is also arbitrary and unjust as there is no logical connection between that charge and the value of that proportion of the privilege represented by that share If the legislature can fix an arbitrary fee of five cents per share without any justification therefor, what is to keep them from making the charge five dollars per share?

The fee originally imposed by Section 5503 of the General Code upon foreign corporations having stock

with par value is three-twentieths of one per cent upon the proportion of the authorized capital stock represented by property owned and used and business transacted within the state. This cannot be applied in case of corporations having stock *without* par value, and to cover this situation Section 8728-11 of the General Code, as amended 109 O. L. page 273, provides that in the case of corporations having stock without par value the fee shall be computed at the rate of five cents per share upon the proportion of the *number of shares* of *authorized* common stock represented by property owned and used and business transacted within the state. The Ohio Statute thus takes the designated proportion of the *number* of shares which the corporation *is authorized* to issue as the basis for computing the fee at five cents per share, although the shares may represent anything from one cent to one hundred dollars or more of actual investment or property instead of using some basis of computation having *some* relation to the value of the assets or the business transacted within the state.

A corporation's capital stock can be properly used as a medium for determining a tax based on its business transacted and property used within the state, only when it fairly reflects the value of the franchise granted. The par value of the issued stock does this to a certain extent, since money or property has been received by the corporation for the stock, but the number of shares into which the authorized issued and unissued stock is divid-

ed has no relation whatever to the value of the property of the corporation or the business transacted by it.

A "share of stock" is a unit of measure of variable size and value which is used to designate units of a corporation's capital stock. To attempt to determine the value of the business transacted and property owned by a corporation, and consequently the value of its franchise, by the number of variable units into which the stock is divided, is analogous to the determination of the value of farms by the number of fields into which they are divided or the value of fluids by the number of cans in which they are contained. Certainly the number of fields or cans could not be considered a reasonable basis for determining the value of the farms or fluid. The unsoundness of such a basis is clearly pointed out in the well reasoned cases of *Farrington vs. Mensching*, 187 N. Y. 8, and *People vs. Walsh*, 195 N. Y. S. 184, commented upon elsewhere in this brief.

We submit that any law which attempts to tax a privilege without limit must be charged upon a real rather than on an assumed basis, and not by multiplying unissued stock which represents nothing by a wholly arbitrary figure the result of which does not and cannot reflect the true value of the privilege, otherwise such a law confiscates property without due process of law in contravention of both the Constitution of the United States and of Ohio.

2.

There is an Arbitrary Discrimination Between Domesticated Foreign Corporations Having Par Value Stock and Those Having Non-Par Value Stock, Amounting to a Denial of the Equal Protection of the Law.

Under Section 5503 of the General Code of Ohio, the fee chargeable against foreign corporations having par value stock is three-twentieths of one per cent on the proportion of its authorized capital stock, which, in dollars and cents, amounts to fifteen cents on each one hundred dollars par value. Concerning the first issuance of such stock, it is fair to assume that such a corporation received property in payment for that stock in an amount equal to the par value thereof, or cash in an amount of at least eighty-five per cent thereof as fifteen per cent is the maximum amount allowed as a commission to underwriters under the Blue Sky Law, Section 6373-12, General Code of the State of Ohio. A corporation having stock without par value may issue and sell its shares for such consideration as shall be the fair value of such shares as fixed by its board of directors, or for such consideration as shall be consented to in writing by all the stockholders, or as fixed by a majority of the stockholders at a meeting called for the purpose. Gen. Code of Ohio, Sec. 8728-1. Since the Commissioner of Securities allowed appellant corporation to sell its stock at seven dollars ($7.00) per share, the State of Ohio then

set the maximum price at a figure which, in the opinion of its officers, was a fair value therefor. We submit there is a denial of the equal protection of the law under the Fourteenth Amendment of the Constitution of the United States and the provision of the Preamble of the Constitution of the State of Ohio, when the law provides for a fee against one domesticated foreign corporation of three-twentieths of one per cent (3/20%) and against another corporation of the same class a fee which, in the instant case, amounts to one and four-tenths per cent (1.4%), or a charge nearly ten times as great. Such is an assumed rather than a substantial basis for a privilege fee. The authorities supporting the above contention are discussed under the next heading.

3.
There is an Arbitrary Discrimination Between Various Domesticated Foreign Corporations Having Non-Par Value Stock Amounting to a Denial of the Equal Protection of the Law.

A second arbitrary discrimination between domesticated foreign corporations for the fee imposed is that it does not bear with substantial equality upon all of such corporations having non par value stock.

The fee imposed by Section 8728-11 of the General Code, in attempting to measure the value of the corporation's assets by the number of shares which it is authorized to issue, in effect subclassifies the foreign corpora-

tions subject to the fee upon a basis which bears no relation whatever, whether reasonable or unreasonable, to the franchise granted. The corporation may, of course, never issue its remaining authorized stock and until issued it cannot be considered as a reasonable basis for classification.

That the legislative power to classify for the purpose of taxation is limited by the requirement that the basis of the classification must bear a reasonable relation to the purposes for which the classification is made, has been repeatedly held by this Court. The principle is clearly stated in the following excerpt from the opinion in *Southern Railway Company v. Greene*, 216 U. S. 400, 417.

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

Among other authorities laying down this principle are *Atlantic Coast Line Company v. Doughton*, 67 Lawyers Coop. Ad. Op. 681, 683; *Raymond v. Chicago Traction Company*, 207 U. S. 20, 38; *Greene v. Louisville & Interurban Railroad Co.*, 244 U. S. 499, 514;

Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 150, at 151, 155, 159 and 160; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 at 560, 561; *Cotting v. Kansas City Stock Yards*, 183 U. S. 79 at 111 and 112; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283 at 294; *Michigan Central R. R. v Powers*, 201 U. S. 245 at 293; *Hayes v. Missouri*, 120 U. S. 68, at 71 and 72; *Kentucky R. R. Tax Cases*, 115 U. S. 321 at 337; *Barbier v. Connolly*, 113 U. S. 27 at 32; *Commonwealth v. Sharon Coal Company*, 164 Pa. 304; *Commonwealth v. Shamokin*, 3 *Dauphin Co. Rep.* 168; *Commonwealth v. L. S. & M. S. R. R.*, same p. 172; *Commonwealth v. Jamestown R. R.*, same p. 214; *Commonwealth v. Coal Co.*, same p. 220., 60 L. R. A. p. 372; *State v. Township*, 36 N. J. L. 66; *In Re Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 377.

It is also well settled that when a state law establishes a class and lays down a rule for taxing its members, the application of the rule must be such as will result in substantial equality as between the members of the class. The principle is well stated in *Gas Realty Company v. Schneider Granite Company*, 240 U. S. 55, 58, where in considering an assessment ordinance it said:

> "But as is implied by *Houck v. Little River Drainage District*, if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law

cannot stand against the complaint of one so taxed in fact. *Martin v. District of Columbia*, 205 U. S. 135, 139."

The principle for which we contend and the reasoning upon which it is based is well stated in the leading case of *Farrington v. Mensching*, 187 N. Y. 8, 79 N. E. 884, in which a law imposing a stamp tax upon transfers of stock was under consideration. Chapter 414, P. 1008 of the Laws of New York, 1906, provided for a tax on all transfers of stock of two cents "on each share of One Hundred Dollars of face value or a fraction thereof." The effect of this provision was to levy a two-cent transfer tax upon each share of stock as such, no matter what its par or actual value might be. The statute was declared unconstitutional for the reason that it resulted in an arbitrary and discriminatory classification in contravention of the equal protection clause of the Fourteenth Amendment. The Court, speaking by Vann J., in pointing out that classification for purposes of taxation must have some basis other than chance or accident, said:

> "The act now before us does not classify by arranging according to quality, but by arranging according to accident. *While it places all corporate shares in a class still it does not treat all members of the class alike but without method or order bears heavily upon some and lightly upon others, which, in effect, is a further classification.* Thus it imposes

the same tax on the sale of dollar shares and hundred dollar shares. *The tax is measured by the number of shares regardless of face value or actual value.* Shares of the same corporation might be taxed ten times as much or only one-tenth as much in one year as compared with the next, if simply the face value of each share were changed without changing the aggregate of the face value of all the shares, or the amount of capital invested, or the value of the assets in which it was invested. Shares are so classified as to tax the sale of those issued by one corporation several times as much as those issued by another of the same kind and in exactly the same situation without any reason for the distinction. *Possibly a valid distinction might be founded on the nature or object of the corporation or on the fact that it enjoyed special privileges,* putting banking and railroad corporations in and leaving manufacturing corporations out, for instance, *but we think none can rest on an accidental and non-essential quality without the violation of fundamental principles.* While the legislature has wide latitude in classification its power in that regard is not without limitation, for the classification must have some basis, reasonable or unreasonable, other than mere accident, whim or caprice. There must be some support of taste, policy, difference of situation or the like, some reason for it even if it is a poor one." (Italics ours).

"The serious objection to the statute under consideration is not that in some abnormal instance of low face value the tax might amount to confiscation, but that the classification is as purely arbitrary as the division of land into fields to which we have alluded. Granting the almost unlimited power of the legislature to classify as it sees fit, still there is no plausible or possible reason why one hundred acres in a single field should not pay the same tax as one hundred acres of equal value in ten fields. It seems equally clear that no distinction in liability to taxation can be drawn between ten shares of the face value of one hundred dollars each and one hundred shares of the face value of ten dollars each. If the corporations have equal assets and are equally successful, the two lots of shares are exactly the same thing. Suppose the entire capital is one hundred thousand dollars, ten shares of one hundred dollars each, or one hundred shares of ten dollars each would represent the same proportion of the corporate property. In other words, the fraction representing the equitable ownership would be exactly the same in each case."******

"The owners of corporate stocks do not stand on an equal footing under the statute. They do not receive the equal protection thereof, for some have to pay more than others in the same situation. Thus, if A. sells one hundred shares of the face value of $10.00 each for $1 000 he is taxed $2.00, while B.,

who sells ten shares of the face value of $100.00 each for $1,000 is taxed twenty cents, the thing sold in each case being worth the same amount. This is not classification but arbitrary or accidental selection."

Following the doctrine of the *Mensching* case, a franchise tax upon corporations having stock without par value was held to contravene the equal protection clause in *People v. Walsh*, 195 N. Y. Sup. 184, (Sup. C. App. Div. 3rd Dep.). Section 214, Chapter 640 of the Laws of New York 1920, provided that for the purpose of determining the annual franchise tax to be paid by foreign corporations having stock without par value, the no par value stock should be deemed to have a value of $100.00. The validity of arbitrarily providing for a value having no relation to the value of the privilege sought to be taxed, was attacked. The case was argued before Judges Cochrane, P. J., and Kellogg, Kiley, Van Kirk and Hindman, JJs. In a carefully considered opinion the Court, speaking by Kellogg J., in sustaining the contention that the tax contravened the equal protection clause of the Federal Constitution, said, (after quoting from the opinion of Judge Vann, in *Farrington v. Mensching* supra):

"* * * The compulsory valuation of $100.00 required by the provision as thus construed to be placed upon every share of no par value stock is entirely arbitrary, and necessarily will result in unequal taxation. It will require corporations having issued

stock of the value of $5.00 per share to pay the same tax per share as corporations having issued stock, the shares of which were in fact worth $100,000 per share. It might have the result of compelling corporations employing in this State a capital of only $1,000 for the privilege of doing their limited business, the same tax as corporations employing within the State a capital of $200,000."

This case was quoted from with approval in *Staples v. Kirby Petroleum Company*, 250 S. W. 293 (Court of Civil Appeals of Texas), in which the same taxing provision in regard to corporations having stock without par value was under consideration.

We submit that the same arbitrary classification denounced in the *Mensching* and *Walsh* cases supra, necessarily results from the application of the Ohio statute under consideration, and that the reason for which the New York statutes were declared unconstitutional also exists in regard to the Ohio law. True, as the lower court pointed out, the New York law measures the franchise fee required of a foreign corporation by the actual capital used within the State, whereas the Ohio law takes the authorized capital stock as the basis for the tax. Since, however, the objection to the law is that the basis for determining the tax has no relation to the value of the privilege it is not apparent how the inequality will be lessened by taking authorized instead of used capital as the basis. A second distinction, that the Ohio law bases the fee at

a fixed amount per share, whereas the New York law is fixed at a certain per cent and gives the stock a fictitious value, is also immaterial in its effect. By placing an arbitrary value upon the stock, the result is to require a different tax upon corporations having capital of the same value. By measuring the tax at a fixed amount per share, the same result follows. This is made clear by a comparison of the appellant's situation under the New York and the Ohio laws. The actual value of appellant's stock without par value, as fixed by the Commissioner of Securities in 1920, was $7.00 per share, making the actual capital invested approximately $350,000. The value of shares of other corporations having the same actual investment may be fixed at one thousand dollars per share and the number of shares correspondingly reduced with the result that the fee paid will only be a small fraction of that required of appellant. Under the New York law the value of appellant's stock would be fixed at $100.00 per share in the same manner as stock worth $1 000, and the same inequality would result.

The actual determination of the value of the stock by the State Securities Commission in effect fixes the par value of the stock, that is the price at which it must be sold, and it therefore represents the money or property with which the corporation began to do business in the same manner as stock having par value. This is easily ascertained and can be conveniently applied. The argument of necessity, therefore, if it ever could justify an arbitrary classification, does not exist in this case.

4.

A Law is Unconstitutional Which Taxes a Franchise on the Basis of a Corporation's Authorized Non Par Value Stock at an Arbitrary Value Far in Excess of the Value Fixed for Its Sale by the State.

When one department of a state has fixed the value of non par stock at a set price, any law which taxes the privilege of doing business within its confines computed on its stock on a basis far in excess of the value theretofore fixed, amounts to the taking of property without due process of law. Such an overlooking of facts within its possession and taxing stock with a value of $7.00 per share upon an arbitrary value of $33.33 1-3 per share (i. e. five cents per share as compared to fifteen cents per share on stock having a par value of $100, under Section 5503) amounts to a confiscation of appellant's property and to a denial of the equal protection of the law.

5.

The Computation of the Annual Fee Charged Foreign Corporations on the Basis of Their Authorized Stock While Domestic Corporations are Charged on the Basis of Their Subscribed or Issued Stock Results in a Flagrant Discrimination in Favor of Domestic Corporations

The license fee sought to be imposed is not one required as a condition precedent to the corporation's admission into the State, and cases holding that the State

may impose such conditions as it desires have no application. Appellant complied with all the conditions required by the State for its admission to do business therein and became a domesticated foreign corporation in September of 1920. (Record page 2-3.)

At the time of its admission into the state the annual fee required of domestic corporations having stock without par value was computed on the basis of ten cents per share of its subscribed or issued stock. (108 O. L. pt. II. 1287). The annual license fee then prescribed for foreign corporations having stock without par value was one cent per share on its authorized capital stock. The difference in rate tended to compensate the inequality caused by the different basis for the fee.

By the Act of May 17, 1921, the section prescribing the rate for both foreign and domestic corporations having stock without par value was amended so as to require a fee of five cents per share *upon the issued and outstanding stock* of domestic corporations, and five cents per share *upon that proportion of the authorized capital stock* of foreign corporations represented by its property owned and used and business transacted within the state. The effect of the change was to cause foreign corporations having a substantial portion of their authorized capital stock unissued to pay a much larger fee than was required of domestic corporations with the same amount of capital invested and enjoying the same, if not greater privileges. This is well illustrated by the situa-

tion in which the appellant found itself. At the time of its admission into the state in 1920, the fee required was $4,000, provided it transacted all its business in Ohio. The fee computed under the statute as amended in 1921, required the plaintiff to pay an annual fee of $20,000 although only a little more than 50,000 of its 400,000 shares of common stock without par value were then issued and outstanding. A domestic corporation with the same authorized and issued stock as appellant would have been required to pay only $2,524.25, or practically twelve and one-half per cent of the amount assessed against appellant.

Relying upon the ratio for the computation of the annual franchise fee, appellant entered the State and acquired two specially constructed factory buildings, equipped with valuable machinery for the manufacture of electric appliances and representing a total investment of more than $485,000, of which $232,000 was used in the purchase and installation of machinery for the production of electric appliances. The number of corporations engaged in similar enterprises is limited, so that the fixed assets of the company were not readily salable and were not easily convertible, (Record pages 24-25). Their position is therefore distinguishable from that of the White Company in *Cheney Brothers Company v. Massachusetts*, 246 U. S. 147, 156, where the complaining corporation owned a garage and storage building.

It seems to us that the appellant's position is clearly within the doctrine of *Southern Railway Company v. Greene*, 216 U. S. 400, in which the familiar principle announced in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, that a corporation which has been admitted to do business within a state cannot be discriminated against unless in accordance with a classification having a real and substantial basis and that the difference of foreign and domestic corporations is not such a basis, was applied.

It is claimed that the doctrine of these cases has been somewhat limited by *Kansas City etc. Ry. Co. v. Stiles*, 242 U. S. 111, and *Cheney Brothers Co. v. Massachusetts* supra. Neither of these cases, however, presents a situation analogous to the one under consideration. In the former, an annual tax imposed by the State of Alabama was computed upon the basis of the paid-up capital stock upon both domestic and foreign corporations. The rate was slightly higher for domestic corporations but the tax was found to be reasonable and in effect at the time the corporation entered the state, and the basis for the tax was the same for both classes of corporations. In the *Cheney* case, a Massachusetts statute imposing an annual tax measured by the authorized capital stock was under consideration. The amount of the tax was small with a maximum of $2,000, which was relied upon to distinguish it from the situation presented in the *International Paper Co. v. Massachusetts* supra, and *Looney v.*

Crane supra. In addition, there was no attempt to discriminate between domestic and foreign corporations.

That cases involving corporation taxes must be determined upon their own peculiar facts has been repeatedly held. *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68; *Kansas City Ry. Co. v. Kansas*, 240 U. S. 227; *Kansas City etc. Ry. v. Stiles*, 242 U. S. 111, 119.

The facts of this case, when considered, disclose a situation which cannot but result in flagrant discrimination. As previously pointed out, requiring foreign corporations to pay a fee computed on the basis of their authorized capital stock, whereas domestic corporations are required to pay on the basis of their issued stock, results in this case in the charging of a fee nearly eight times as great as would be imposed on a domestic corporation, and the appellant has actually been assessed nearly eight times as much as would be assessed against an Ohio corporation with exactly the same authorized and issued capital stock.

Assume that appellant corporation with all of its property located in Ohio, and any one of the many domestic corporations with which it is engaged in severe competition each manufactured and sold in intra and interstate commerce 20,000 washing machines or vacuum cleaners each and that both had identically the same amount of authorized and subscribed, issued and outstanding stock. The tax against appellant is one dollar per machine while its competitor will pay but approximately

sixteen cents per machine. Can such a law be said to give equal protection of the law to citizens of different states? We submit that it not only denies that, but confiscates property without due process of law.

More competition and resulting cheaper prices has been the outcry in this state and nation for the last decade and many have been punished for stifling it. With such laws in the books and spirit in the air it is contrary to all justice and reason for a state to pass a law that not only stifles competition but throttles it. This law forces appellant to add a material figure to the cost of its articles over and above that which its competitor must add. As more than sixty per cent of its product is sold in interstate commerce, we submit even though that statute disclaims any attempt to tax interstate commerce, it in effect does so, placing a severe burden thereon because the basis used is the unfair one, of proportion of the authorized stock, instead of the proportion of the subscribed, issued and outstanding stock.

A tax of $20,000 as compared to appellant's property and business in the state, merely for the privilege of doing business for one year, which, of course, is in addition to the initial fee and property taxes, is further evidence of the unreasonableness of a classification under which such an exorbitant fee can be assessed. The rate at which the fee is computed was greatly increased after the corporation had been admitted to the state, so that it cannot be said to have agreed to such an excessive franchise fee at the time of its entrance in the state.

In this connection, it is instructive to examine the annual franchise fees which are exacted by other states:

Eight states require no annual license fee from either domestic or foreign corporations. They are, District of Columbia, Florida, Louisiana, Minnesota, Mississippi, Nevada, South Dakota and Wyoming. Twenty-four states, Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Kentucky, Michigan, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, Pennsylvania, Tennessee, Utah, Vermont, Washington and Wisconsin, compute the fee required on the same basis for domestic and foreign corporations. Delaware and New Jersey tax on the same basis except that a reciprocal tax is required in the case of foreign corporations. In the remaining states foreign and domestic corporations are taxed on a different basis but owing to the small fee charged with a low maximum the gross inequalities arising under the Ohio law are not possible. The nearest approach to an arbitrary discrimination against foreign corporations is found in Oklahoma, West Virginia and Texas. In the former states the fee charged foreign corporations is 100 per cent and 50 per cent respectively more than required of domestic. In each case the rate is low, however, the inequality is fixed and is of such an amount as might be claimed to be not disproportionate to the different privileges conferred. The Texas statute purports to compute the fee on the same basis as Ohio, i. e., the author-

ized capital stock for foreign corporations and issued for domestic. This statute, however, was construed in *Staples v. Kirby Petroleum Co.*, 250 S. W. 293,(Tex. Civ. App.), to mean actual capital employed and hence subscribed and issued stock. So applied, there is no discrimination.

Under the Ohio law as construed by Ohio courts, *Bedford Coal Co. v. Fulton*, 98 O. S. 350, 354, the par value of the authorized shares is taken without regard to the actual capital employed. The effect is a manifest and frequent discrimination against foreign corporations, bearing without reason or regularity upon foreign corporations and resulting in a tax eight times as great as required of domestic corporations in the present case.

6.

Section 8728-11 As Amended in 109 Ohio Laws, Page 273, Is Unconstitutional As Being Retroactive, Or Action of Appellees Illegal As They Give The Same A Retroactive Effect.

Appellees' answer to the amendment of the bill of complaint filed December 13, 1921 admits that Section 8728-11, as amended in 109 Ohio Laws 273, 277, became effective on the 14th day of August, 1921. Because of the provisions found in Section 5499, appellant was required to and did file a report to the Tax Commission of the State of Ohio during the month of July, 1921, and the report which it did file was based upon Section 5503 of the General Code of the State of Ohio, as shown by

Exhibit No. 2 following page 28 of the record, for no provision was made in said report for any report of stock other than par value stock.

Section 5506 of the General Code of the State of Ohio provides that such fees shall be a first and best lien on all of the property of the corporation, and it has been held such lien attaches as of the date of the filing of the report.

We submit that, the appellees having admitted that said Section 8728-11 was not in effect until August 1, 1921, that none of the defendants could legally fix any such fee as against appellant as would be based upon that particular section, for in doing so appellees clearly place a retroactive effect upon such statute, which is contrary to Section 28, Article 2 of the Constitution of the State of Ohio.

CONCLUSION

For the reasons stated, we submit that the decree of the District Court should be reversed in so far as it upholds the arbitrary basis and classification resulting from the application of Section 8728-11 and Section 5503 of the General Code.

Respectfully submitted,

THOS. H. TRACY

GEO. D. WELLES.

NEWTON A. TRACY.

Solicitors for Appellant.

Supreme Court of the United States

October Term, 1923.

No. 266.

AIR-WAY ELECTRIC APPLIANCE CORPORATION,
Appellant,

vs.

HARRY S. DAY, TREASURER OF THE STATE OF OHIO, ET AL.,
Appellees.

No. 267.

HARRY S. DAY, TREASURER OF THE STATE OF OHIO; JOSEPH T. TRACY, AUDITOR OF THE STATE OF OHIO; JOHN R. CASSIDY, S. E. FORNEY, C. A. HORN, AS THE TAX COMMISSION OF THE STATE OF OHIO; AND THAD H. BROWN, SECRETARY OF STATE OF THE STATE OF OHIO,
Appellants,

vs.

AIR-WAY ELECTRIC APPLIANCE CORPORATION,
Appellee.

Appeals from the District Court of the United States for the Southern District of Ohio.

BRIEF FOR APPELLEES IN CASE No. 266 and for APPELLANTS IN CASE No. 267.

BRIEF FOR APPELLEES (STATE OFFICERS) IN CASE NO. 266.

STATEMENT OF THE CASE.

We adopt the statement given in the brief for appellant, except as supplemented by the following:

(A) The action taken as to plaintiff's stock by the department of securities is described in the bill of complaint in these words (Record, pp. 2 and 3):

> "The plaintiff corporation received a certificate from the department of securities of the State of Ohio **authorizing the sale** of its common and founders' stock at a price of seven dollars per share for **each share** of stock. * * *." (Black face ours.)

The answer of the state officers recites (Record, p. 11):

> "Defendants further admit that by act of the securities department under the so-called Blue Sky Law and upon the application of the plaintiff, the price at which said plaintiff was **permitted to offer** its stock for sale **in the state of Ohio** was seven dollars per share * * *." (Black face ours.)

The so-called securities or Blue Sky Law of Ohio (Sections 6373-1 to 6373-24, General Code of Ohio), entitled at the time of its original passage in 1913 (103 Ohio Laws, 743),

> "An act to regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio, and to prevent fraud in such sales,"

provided among other things at the time plaintiff re-

ceived its said certificate, that corporations not exempted by the terms of the act from compliance therewith should, before selling their stock, or offering it for sale, in Ohio, file with the commissioner of securities an application for authority to make such sale, accompanied by certain specified information, and that (Sec. 6373-16):

> "* * * And if it shall appear that the law has been complied with and that the business of the applicant is not fraudulently conducted, and that the proposed disposal of such securities or other property is not on grossly unfair terms, and that the issuer or vendor is solvent, upon the payment of a fee of ten dollars the commissioner shall issue his certificate to that effect authorizing such disposal. * * * *"

Section 6373-17 then provided:

> "Such certificate shall recite in bold type that the 'commissioner' in no wise recommends such securities or other property; and no person or company shall advertise, in connection with the sale of such securities, the fact that such certificate has been issued unless such advertisement also contains in bold type a copy of such recital."

(B) Sec. 8728-11, Ohio G. C., the statute under attack, was first enacted in 1919. Through error in printing, the year is given as 1909, in the opinion of the District Court (Record, top p. 35). By way of addition to the statement of the District Court, it is perhaps proper to say that the act of 1919 (Secs. 8728-1 to 8728-12, Ohio G. C.), marked not only the beginning of legislation in Ohio authorizing the incorporation in that state of corporations with no par stock, but also contained in said

Section 8728-11 the first specific statutory provision for franchise taxes upon no par stock foreign corporations as distinguished from like corporations having par stock. The first amendment of the 1919 no par stock act was by the act of February 4th, 1920 (Rec., top p.35). This amendment is by error referred to in the brief of appellant (p. 5) as the amendment of February, 1919.

(C) The Delaware statute authorizing corporations to issue no-par stock is Section 1918 a, originally enacted as Section 4a of an act of March 20th, 1917 (Laws of Delaware, 1917, page 321):

> "1918a. Section 4a. **Stock Without Par Value.**—Any corporation may, if so provided in its certificate of incorporation or in an amendment thereof, issue shares of stock (other than stock preferred as to dividends or preferred as to its distributive share of the assets of the corporation or subject to redemption at a fixed price) without any nominal or par value. Every share of such stock without nominal or par value shall be equal to every other share of such stock, except that the certificate of incorporation may provide that such stock shall be divided into different classes with such designations and voting powers or restriction or qualification thereof as shall be stated therein, but all such stock shall be subordinate to the preferences given to preferred stock, if any. Such stock may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the board of directors thereof, pursuant to authority conferred in the certificate of incorporation, or if such certificate shall not so provide, then by the consent of the holders of two-thirds of each class of stock then outstanding and entitled to vote given at a meeting called for that purpose in such manner as shall be prescribed by the by-laws, and any and all such shares so issued, the full consideration for which has

been paid or delivered, shall be deemed full paid stock and not liable to any further call or assessment thereon and the holder of such shares shall not be liable for any further payments under the provisions of this chapter.

In any case in which the law requires that the par value of the shares of stock of a corporation be stated in any certificate or paper, it shall be stated, in respect of such shares, that such shares are without par value, and wherever the amount of stock, authorized or issued, is required to be stated, the number of shares authorized or issued shall be stated, and it shall also be stated that such shares are without par value. For the purpose of the taxes prescribed to be paid on the filing of any certificate or other paper relating to corporations and of franchise taxes prescribed to be paid by corporations to this state, but for no other purpose, such shares shall be taken to be of the par value of one hundred dollars each."

ARGUMENT.

I.

The only function of the department of securities is to prevent the fraudulent sale of securities. If that function is to be enlarged, for the purposes of this case, to the extent claimed throughout the brief for appellant, then, logically, appellant's stock is worth $2,800,000.00, or seven dollars per share for the whole 400,000 shares.

II.

It is true, as stated in branch 6 of brief for appellant, (p. 37), that the answer of the state officers admits (Rec. top p. 15) that the amendment of Sec. 8728-11 did not go into effect until August 14, 1921. But accompanying the admission is a statement exhibiting the view of defendants that the amendment would not operate retroactively if applied in calculating plaintiff's tax for 1921. At best, the admission cannot be taken as one of fact, and is to be treated as a legal conclusion, since the determining factor is whether the operation of the amendment was held in abeyance for ninety days because of the referendum provision of the Ohio Constitution. This question is fully gone into by the District Court (Opinion, Rec., pp. 36 to 38); and the court holds that the amendatory act, being a revenue measure, went into immediate effect on its filing with the secretary of state on May 17th, 1921.

With these comments, we submit the case on the two opinions of the District Court, as set out at pages 34 and 51, respectively, of the record. The first of these opinions has been reported in 279 Federal Reporter, 878.

BRIEF FOR APPELLANTS (STATE OFFICERS) IN CASE No. 267.

STATEMENT OF THE CASE.

All of the manufacturing of Air-Way Electric Appliance Corporation is done in Ohio. (Rec., pp. 2, 24, 25). The total sales of the corporation during the eleven months it had been in business prior to June 30th, 1921, as of which latter date its annual report was made, amounted to $250,594.58, of which $179,792.28 was for sales outside of Ohio, and $70,802.30 was for sales in Ohio. (Affidavit, Rec., pp. 22, 23; affidavit, Rec., pp. 26, 27). The amounts thus given correspond to what complainant designated as business transacted outside of Ohio, and business transacted in Ohio, respectively, in its application to the tax commission to re-figure its tax (Rec., p. 19), and in its amendment and supplement to bill of complaint (Rec., p. 16).

The figures just noted were taken by the District Court as representing plaintiff's "business transacted" outside of Ohio, and within Ohio, respectively, and were accordingly used by that court in calculating the tax, all as shown by the following excerpt from the court's opinion (Record, pp. 53 to 55):

> "In the case of Hump Hairpin Mfg. Co. v. Emmerson, supra, it was held that the business done by a corporation, similarly situated to the plaintiff in this case, with residents of states other than Illinois, is interstate business, and that a state may not use its taxing power to regulate or burden intertate commerce. However, it was concluded in that case that 'at the most, the assessment is, so far as interstate commerce is concerned, incidental, remote and

unimportant, and it is therefore constitutional.' In the instant case, the amount assessed by the commission upon interstate commerce is not remote, incidental and unimportant, but, on the contrary, is a substantial sum levied directly upon the stock representing interstate business. It is wholly unnecessary to consider the power of a state to levy a tax in gross upon a foreign corporation based upon the company's entire business both intrastate and interstate, for as we construe this statute it was not the purpose and intent of the general assembly of Ohio to include interstate business as a basis for this levy but only as a factor in determining the proportion that should be paid upon strictly state business. The purpose and intent of this statute is further discussed later in this opinion. But wholly aside from this consideration, it is clear from admitted facts, which were not before the tax commission when the assessment in question was made and certified, that the commission has not applied its own announced rule for the ascertainment of the correct amount of tax to be paid by foreign corporations. The plaintiff is manifestly entitled to the benefit of that rule and it must be presumed the tax would have been computed in accordance therewith, if the report of plaintiff to the tax commission had correctly and fully disclosed the facts pertaining to its business. That the commission finally failed to do so through mistake or inadvertence is no reason for denying relief from an erroneous charge. Cooley on Taxation, 1447; Charleston v. County Com'rs., 109 Mass., 270; Dunnell Mfg. Co. v. Inhabitants of Pawtucket, 73 Mass. 277; City of Wilmington v. Ricaud, 90 Fed. 214, C. C. A. 4; Brown v. French, 80 Fed. 166.

From the pleadings and evidence the amount of plaintiff's authorized common stock represented by property owned and used and business transacted in the state is readily ascertainable. Having regard to the teachings of the Hump Hairpin Mfg. Company case, which is necessarily controlling, if the amount

of plaintiff's property in Ohio ($458,278.56) plus the amount of its business in Ohio ($70,802.30) be divided by the amount of its property in Ohio ($458,-278.56) plus its total business transacted ($250,-594.58), the resulting quotient multiplied by the number of shares of authorized common stock gives the number of shares (298,520) representing the property owned and used and business transacted in this state. The computation thus made coincides with the result obtained by the use of the formula specifically set forth at pp. 156, 157, in the Ohio Tax Laws compiled by the tax commission in 1920, by the use of which it is said 'the amount of tax to be assessed under the statute may be worked out with mathematical precision.' The tax on 298,520 shares at five cents per share is $14,926.00—the amount which plaintiff should pay, if there be no valid ground for relief from any part of the same.

It is true that following the above mentioned formula promulgated by the tax commission is a statement (p. 157) expressing the conclusion reached by the attorney general of Ohio in 1915 (Attorney General's Report, 1915, p. 460), that 'The operation of a factory in Ohio by a foreign corporation having its principal place of business in another state constitutes 'doing business' in Ohio, regardless of where the products of such factory are sold or transported; and it is reasonable and lawful under Sec. 5502 to measure the volume of such business by sales of manufactured articles, whether such sales otherwise represent interstate commerce or not.' Sec. 5502 relates to the determination by the tax commission of the proportion of the authorized capital stock of a foreign corporation represented by its property and business in the state and the certification of the same to the auditor of state. If in determining the amount of the state excise tax the use made of the amount of sales representing interstate business is such that the tax affects interstate commerce so directly and immediately as to constitute

a genuine and substantial burden or restraint upon such commerce, the view expressed in the above quoted passage is under the rule announced in the Hump Hairpin Mfg. Company case unusual, and, if the statute here under consideration is in its general operation productive of such a result it must fail for want of constitutionality. The annual tax assessed against a foreign corporation is, it is true, for the privilege of exercising its franchises in the state, but the interstate business being a factor in measuring the amount, if the tax be excessive on account of such factor, the net result is the substantial and genuine fettering of such business."

The $14,926.00 thus arrived at is the amount for which the District Court rendered its decree.

ASSIGNMENT OF ERRORS.

(Record page 67.)

"Said court erred in finding that 298,520 shares of the authorized capital of plaintiff represented the property owned and used and business transacted by plaintiff in the state of Ohio, and in not finding a greater number of such shares * * * to represent the property owned and used and business transacted by plaintiff in the state of Ohio."

"Said court erred in finding plaintiff's tax to be $14,926.00, and in not finding said tax to be in excess of such sum * * *."

"Said court erred in enjoining the tax commission of Ohio from certifying for collection the nonpayment by plaintiff of a tax in excess of $14,926.00, and in enjoining the secretary of state, auditor of state and treasurer of state, of the state of Ohio, from collecting or attempting to collect any part of a tax in excess of $14,926.00, * * *."

ARGUMENT.

"Business Transacted" in Ohio by a Foreign Corporation Doing all its Manufacturing in Ohio and Selling its Products Both in and Outside of Ohio, Includes, Within the Contemplation of Sections 5499 to 5503, General Code, the Entire Manufacturing Cost of Such Products.

Sections 5499 and 5503 are quoted in the brief for appellant (pp. 4 and 5). We quote here Sections 5501 and 5502:

"**Sec. 5501.** Such report shall contain:

1. The name of the corporation and under the laws of what state or country organized.

2. The location of its principal office.

3. The names of the president, secretary, treasurer and members of the board of directors, with the post-office address of each.

4. The date of the annual election of officers.

5. The amount of authorized capital stock, and the par value of each share.

6. The amount of capital stock subscribed, the amount of capital stock issued, and the amount of capital stock paid up.

7. The nature and kind of business in which the company is engaged and its place or places of business, both within and without the state.

8. The name and location of its office or offices in this state, and the name and address of the officers or agents of the corporation in charge of its business in this state.

9. The value of the property owned and used by the company in this state, where situated, and the value of the property owned and used outside of this state, and where situated.

10. The change or changes, if any, in the above particulars made since the last annual report."

"**Sec. 5502.** Upon the filing of the report, provided for in the last three preceding sections, the commission, from the facts thus reported and any other facts coming to its knowledge, bearing upon the question, shall, on the first Monday in September, determine the proportion of the authorized capital stock of the company represented by its property and business in this state. On the first Monday of October, the commission shall certify the amount of the proportion of the authorized capital stock of each such company represented by its property and business in this state, as determined by it, to the auditor of state."

The construction of Sections 5499 et seq., which we here contend for, was not presented to the District Court. There is no finding of facts by that court, nor is there any evidence, showing manufacturing costs. Nevertheless, we take it that if this court finds that the decree below proceeded from an erroneous view of the law, there may be a reversal with instructions to the District Court to make correction in the amount of the tax.

Murdock v. Ward, 178 U. S., 139; 149.
Little Miami Railroad Company v. United States, 108 U. S., 277.
Barnes v. Williams, 11 Wheaton, 415.

The exceedingly small element of interstate commerce in a case like the present, was pointed out in **Hump Hair Pin Mfg. Co. v. Emmerson**, 258 U. S., 290.

But we have been unable to discover anything in that case or in the formula of the tax commission referred to by the District Court which excludes from the term "business transacted in Ohio" the cost of manufacturing in Ohio of goods which might ultimately be sold in interstate commerce. The formula of the tax commission is a verbatim quotation from the case of **State of Ohio v. Cabin Creek Consolidated Coal Company**, 17 Ohio Nisi Prius Reports (New Series), page 60, and we quote the formula in full (Ohio Tax Laws, 1920, as compiled by the tax commission):

> "The tax commission is an administrative body, being required to determine the tax 'upon the proportion of the authorized capital stock of the corporation represented by the property owned and used and business transacted in this state.' (Section 5502.) Its function is to follow the letter of the statute and make the mathematical computation according to the intent thereof.
>
> By so doing, the amount of tax to be assessed under the statute may be worked out with mathematical precision as follows:

Value of property in Ohio	$ 300.00
Business done in Ohio	138,752.28
Total	$139,052.28
Value of property in West Virginia	$2,470,400.00
Business done outside of Ohio	737,074.58
Total	$3,207,474.58
Total property and business both in and outside of Ohio	$3,346,526.58

139,052÷3,346,526=.04155
$1,500,000x.04155=$62,225
Authorized capital stock stock $1,500,000.

Three-twentieths of one per cent. of $62,225=$93.337"

The opinion of the attorney general of Ohio mentioned by the District Court (Opinions of the Attorney General for 1915, Vol. 1, p. 460) dealt with a foreign corporation which had its principal place of business and actual business office in Illinois and had various manufacturing plants located both in Ohio and outside of Ohio. It was as to such a corporation that the attorney general held that the total sales from the Ohio manufacturing plants might be taken as the criterion of "doing business" in Ohio, regardless of whether the products were sold in Ohio or elsewhere. But neither that opinion nor the formula of the tax commission undertakes to define "business transacted in Ohio" as applied to such a case as the present, where the entire manufacturing is done in Ohio and the actual business office is in Ohio.

We submit then that the District Court was not warranted in treating plaintiff's sales, $179,792.28, outside of Ohio as "business transacted" outside of Ohio, but that from such amount there should be deducted the cost of manufacturing.

This construction of the statute, we submit, will not yield an unconstitutional result as burdening interstate commerce;

American Manufacturing Co. v. City of St. Louis 250 U. S., 459;
The Minnesota Rate Cases, 230 U. S., 352; 411.
Bacon v. Illinois, 227 U. S., 504.
Coe v. Errol, 116 U. S., 517.

And again, the construction is consistent with the principle that goods do not enter the field of interstate commerce until they begin to be transported to another state from the state in which they were manufactured.

Kidd v. Pearson, 128 U. S., 1.
Cornell v. Coyne, 192 U. S., 418.
Diamond Glue Co. v. United States Glue Company. 187 U. S., 611.
McCluskey, Admr. v. Marysville, etc. R'y Co., 243 U. S., 36.
Coe v. Errol, supra.
Bacon v. Illinois, supra.

CONCLUSION.

We submit, then, that the decree of the District Court should be reversed in so far as it limits the amount of the tax to $14,926.00, and should be affirmed in all other respects.

Respectfully submitted,

CHARLES C. CRABBE,
Attorney General of Ohio.
WILLIAM J. MEYER,
Solicitors for Appellee in Case No. 266, and for Appellants in Case No. 267.

AIR-WAY ELECTRIC APPLIANCE CORPORATION *v.* DAY, TREASURER OF THE STATE OF OHIO, ET AL.

DAY, TREASURER OF THE STATE OF OHIO, ET AL. *v.* AIR-WAY ELECTRIC APPLIANCE CORPORATION.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Nos. 31 and 32. Argued April 30, May 1, 1924.—Decided October 20, 1924.

A manufacturing corporation, incorporated in Delaware with an authorized capital stock of a designated number of non-par value shares, of which only about one-eighth were issued, had all its property in Ohio, where it was duly authorized to do business, and transacted during a tax year a business of which 28% was confined to Ohio and the remainder was interstate. Under an Act of May 17, 1921 (§ 8728–11 Gen. Code Ohio) which prescribes an annual fee payable by each foreign corporation having common stock without par value, for the privilege of exercising its franchise in the State, of "five cents per share upon the proportion of the number of shares of authorized common stock, represented by property owned and used and business transacted in this State . . . ," the taxing authorities assessed a tax by applying this prescribed rate to the entire number of shares authorized. The court below reduced this by taking such proportion of the total number of shares authorized, as the value of the property plus

the local business was of that value plus all the business, and by applying the rate to the result. *Held:*

(1) That the tax, computed either way, and the act, violate the commerce clause, since all the corporation's business, intrastate and interstate, and all its property, were represented by the shares of stock outstanding; and the application of the rate to all the shares authorized, or to a number greater than the total outstanding, necessarily amounted to a tax and direct burden upon all the property and business, including the interstate commerce. P. 82.

(2) The fee imposed, in either case, was arbitrary, since the number of non-par shares which the corporation might issue under the law of Delaware was not an indication of the amount of its capital, and the number not subscribed or issued had no relation to the value of the privilege of doing business in Ohio. P. 83.

(3) The act, in its practical operation, does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances. P. 84.

(4) A classification of foreign corporations for the purpose of determining the amounts of such annual franchise fees should be based upon something having relation to the purpose for which it was made. P. 85.

(5) The Ohio act, having no tendency to produce equality, and being of such character that there is no reasonable presumption that substantial equality will result from its operation, violates the equal protection clause of the Fourteenth Amendment. *Id.*

279 Fed. 878, reversed.

APPEAL and cross appeal from a decree of the District Court, enjoining the Treasurer and other officials of Ohio from collecting more than a stated portion of a franchise fee from the above named corporation, but declining to hold the tax void *in toto*, as the corporation claimed it to be, in this suit to enjoin its collection.

Mr. Newton A. Tracy, with whom *Mr. Thomas H. Tracy* and *Mr. George D. Welles* were on the briefs, for Air-Way Electric Appliance Corporation.

Under the Ohio constitution, "a tax on privileges and franchises can not exceed the reasonable value of the privilege or franchise originally conferred, or its continued

annual value thereafter. The determination of such values rests largely in the general assembly, but finally in the courts." *Southern Gum Co.* v. *Laylin*, 66 Oh. St. 578.

The privilege which appellant corporation has enjoyed for one year in Ohio was to use and own property of the value of $458,278 upon which it must pay the usual property taxes, and to do business in the State to the extent of $70,802.30. The lower court fixed the fee chargeable for the year 1921 at $14,926.00. Such a fee, when considering the privileges conferred, is far above the continuing value thereof and is unreasonable and in fact confiscatory.

The basis upon which the tax is computed bears no relation to the value of the privilege conferred. First, it takes the proportion of the number of shares of authorized stock represented by property owned and used and business done within the State, and, second, it multiplies that number by an arbitrary figure of five cents.

An initial fee based upon the authorized stock is usual, both when a new domestic corporation is formed and when a foreign corporation becomes domesticated. Beyond that, any fee for the privilege of carrying on business based upon authorized stock, unless it is reasonably limited in its maximum amount, is an anomaly, and unjustifiable.

Unissued stock, however, represents nothing and can have no relation to property owned or business transacted. Hence a fee computed on such a basis is unreasonable and unjust.

Various methods of computation have been used by different States. New York, for example takes the proportion which the corporation's actual capital employed within the State bears to its entire capital. Other States take the proportion of the subscribed or issued capital stock represented by property owned within the State; while another method used is to measure the fee by the business transacted within the State. It will be noticed

that in each of these methods the basis taken is indicative of the value of the privilege conferred. This is accomplished directly under a plan where the actual capital employed within the State is taken, and indirectly where the issued stock represented by the capital employed within the State is used.

When a basis of taxation is taken which does not reflect the value of the privilege sought to be taxed, there is a want of due process of law and a denial of the equal protection of the law. *Looney* v. *Crane Co.*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135.

The charge of five cents a share upon each share of authorized stock is also arbitrary and unjust as there is no logical connection between that charge and the value of that proportion of the privilege represented by that share. If the legislature can fix an arbitrary fee of five cents per share without any justification therefor, what is to keep them from making the charge five dollars per share?

A corporation's capital stock can be properly used as a medium for determining a tax based on its business transacted and property used within the State, only when it fairly reflects the value of the franchise granted. The par value of the issued stock does this to a certain extent, since money or property has been received by the corporation for the stock, but the number of shares into which the authorized issued and unissued stock is divided has no relation whatever to the value of the property of the corporation or the business transacted by it. *Farrington* v. *Mensching*, 187 N. Y. 8; *People* v. *Walsh*, 195 N. Y. S. 184.

There is an arbitrary discrimination between domesticated foreign corporations having par value stock and those having non-par value stock, amounting to a denial of the equal protection of the law.

There is an arbitrary discrimination between various domesticated foreign corporations having non-par stock amounting to a denial of the equal protection of the law.

That the legislative power to classify for the purpose of taxation is limited by the requirement that the basis of the classification must bear a reasonable relation to the purposes for which the classification is made has been repeatedly held by this Court. *Southern Ry. Co.* v. *Greene*, 216 U. S. 400; *Atlantic Coast Line R. R. Co.* v. *Daughton*, 262 U. S. 413, and many other cases.

It is also well settled that when a state law establishes a class and lays down a rule for taxing its members, the application of the rule must be such as will result in substantial equality as between the members of the class. *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55; *Farrington* v. *Mensching*, 187 N. Y. 8; *Staples* v. *Kirby Petroleum Co.*, 250 S. W. 293.

The actual determination of the value of the stock by the State Securities Commission in effect fixes the par value of the stock, that is the price at which it must be sold, and it therefore represents the money or property with which the corporation began to do business in the same manner as stock having par value. This is easily ascertained and can be conveniently applied. The argument of necessity, therefore, if it ever could justify an arbitrary classification, does not exist in this case.

When one department of a State has fixed the value of non-par stock at a set price, any law which taxes the privilege of doing business within its confines computed on its stock on a basis far in excess of the value theretofore fixed, amounts to the taking of property without due process of law.

The computation of the annual fee charged foreign corporations on the basis of their authorized stock while domestic corporations are charged on the basis of their subscribed or issued stock results in a flagrant discrimination in favor of domestic corporations. *Southern Ry. Co.* v. *Greene*, 216 U. S. 400; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1. *Kansas City, etc. R. R. Co.* v.

Stiles, 242 U. S. 111; *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147, distinguished.

That cases involving corporation taxes must be determined upon their own peculiar facts has been repeatedly held. *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *Kansas City Ry. Co.* v. *Kansas*, 240 U. S. 227; *Kansas City etc. R. R. Co.* v. *Stiles*, 242 U. S. 111.

Section 8728–11, as amended, is unconstitutional as being retroactive, or action of appellees illegal as they give the same a retroactive effect. Ohio Const., § 28, Art. 2.

Mr. William J. Meyer, with whom *Mr. Charles C. Crabbe*, Attorney General of the State of Ohio, was on the brief, for Day, Treasurer, et al.

"Business transacted" in Ohio by a foreign corporation doing all its manufacturing in Ohio and selling its products both in and outside of Ohio, includes, within the contemplation of §§ 5499 to 5503, General Code, the entire manufacturing cost of such products.

The construction of §§ 5499 *et seq.*, which we here contend for, was not presented to the District Court. There is no finding of facts by that court, nor is there any evidence, showing manufacturing costs. Nevertheless, we take it that if this Court finds that the decree below proceeded from an erroneous view of the law, there may be a reversal with instructions to the District Court to make correction in the amount of the tax. *Murdock* v. *Ward*, 178 U. S. 139; *Little Miami etc. R. R. Co.* v. *United States*, 108 U. S. 277; *Barnes* v. *Williams*, 11 Wheat. 415.

The exceedingly small element of interstate commerce in a case like the present, was pointed out in *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S. 290.

But we have been unable to discover anything in that case or in the formula of the tax commission referred to by the District Court which excludes from the term

"business transacted in Ohio" the cost of manufacturing in Ohio of goods which might ultimately be sold in interstate commerce. The formula of the tax commission is a verbatim quotation from *State* v. *Coal Co.*, 17 Oh. N. P. Rep. (N. S.) p. 60.

We submit then that the District Court was not warranted in treating plaintiff's sales, $179,792.28, outside of Ohio as "business transacted" outside of Ohio, but that from such amount there should be deducted the cost of manufacturing.

This construction of the statute, we submit, will not yield an unconstitutional result as burdening interstate commerce. *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459; *Minnesota Rate Cases*, 230 U. S. 352; *Bacon* v. *Illinois*, 227 U. S. 504; *Coe* v. *Errol*, 116 U. S. 517.

And again, the construction is consistent with the principle that goods do not enter the field of interstate commerce until they begin to be transported to another State from the State in which they were manufactured.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Plaintiff, Air-Way Electric Appliance Corporation, brought this suit against the above named treasurer and other state officers to restrain the collection of a franchise fee charged against it as a foreign corporation for the privilege of exercising its franchises in Ohio during the year commencing July 1, 1921, on the grounds, among others, that the legislation of Ohio, under which the fee was imposed, is invalid under the commerce clause of the Constitution, and is repugnant to the Fourteenth Amendment.

Plaintiff was incorporated in 1920 under the laws of Delaware. Under its certificate of incorporation and the laws of that State, its authorized capital stock is 400,000 shares without par value, of which 200,000 shares are common stock and 200,000 founders' stock. The only

difference between the two classes is that holders of the former are entitled to one vote per share and of the latter to five votes per share. Shortly after its incorporation, it obtained from the Secretary of State in conformity with the laws of Ohio a certificate of admission to do business in that State, and also paid the initial fee for the privilege of there exercising its franchise. §§ 178, 179, 180, 183, 184, General Code of Ohio. It complied with the laws of Ohio regulating the sale of stock in that State and received a certificate from the Commissioner of Securities authorizing sale at $7 per share. §§ 6373 (1)–6373 (24), General Code of Ohio. It acquired two large manufacturing plants at Toledo, including grounds, buildings, tools, machinery, etc. August 1, 1920, it commenced business,—the manufacture of electrical household appliances and their sale in Ohio and elsewhere. In July, 1921, as required by law, it filed with the tax commission a report covering the year ended July 1, 1921. There had been issued and were then outstanding only 50,485 shares of stock, of which 10,010 shares were common and 40,475 were founders' stock. All of its property was located in Ohio; its value was $458,278.56. The amount of business transacted in the preceding year was $250,594.58. The complaint alleged and the answer admitted that the value of the stock was $7 per share.

Section 5503 (enacted May 31, 1911) imposes an annual fee required of foreign corporations having capital stock with par value as follows: "On or before October fifteenth, the auditor of state shall charge for collection, as herein provided, annually, from such company, in addition to the initial fees otherwise provided for by law, for the privilege of exercising its franchises in this state, a fee of three-twentieths of one per cent. upon the proportion of the authorized capital stock of the corporation represented by the property owned and used and business transacted in this state . . . ."

An Act of May 17, 1921 (§ 8728-11, General Code of Ohio) provides: ". . . The amount of fees payable by a foreign corporation having common stock without par value . . . under section 5503 shall be three-twentieths of one per cent. upon the proportion of the authorized preferred stock represented by property owned and used and business transacted in this state and five cents per share upon the proportion of the number of shares of authorized common stock, represented by property owned and used and business transacted in this state . . ."

Under the section last quoted, an annual fee of $20,000 was assessed and payment on or before December 1, 1921, was demanded, and notice was given that, if not made on or before that day, a penalty of 15 per cent. would be added. Under the laws of the State, all fees, taxes and penalties constitute liens on the corporation's property; a fine for each day's delinquency may be imposed; and in case of failure to pay, its authority to do business is liable to cancelation, and injunction and ouster are authorized. §§ 5506, 5507, 5509, 5512, 5513.

Plaintiff's report to the tax commission stated that the amount of business transacted in Ohio in the year ended July 1, 1920, was $250,594.58, whereas that figure represented its total sales, of which only $70,802.30, or about 28 per cent. was intrastate, and the balance $179,792.28, or about 72 per cent. was interstate. The state officers, assuming that all plaintiff's property and business was located and transacted in Ohio, made no apportionment between local and interstate business and fixed the annual franchise fee at five cents per share on its total authorized stock.

Plaintiff invoked equity jurisdiction on the ground that it was threatened with irreparable injury through the enforcement of the coercive provisions of the statutes above referred to. *Ohio Tax Cases*, 232 U. S. 576, 587. A mo-

tion for a temporary injunction was heard by a court of three judges. § 266, Judicial Code. It was held (279 Fed. 878) that the plaintiff's objections to the act and the tax were not valid; but the bill was retained to await the result of an application by the plaintiff to the tax commission for a rehearing and correction of the amount of the tax. Plaintiff made such an application, setting forth the above mentioned amount of intrastate and interstate sales respectively. The commission held that, as more than 60 days had elapsed after the certification of the amount of the tax by the state auditor, it had no jurisdiction to entertain such an application. At a later hearing, the court held that the commission was authorized to grant plaintiff a rehearing and make correction if it found the tax or any part of it to be erroneous; that it was not the intent of the state laws to include interstate commerce as a basis for the levy, and that plaintiff may not be taxed on its interstate business and on the portion of its authorized stock represented by property owned and used and business transacted in other States; that the $20,000 charge included a substantial sum levied directly on the stock representing interstate business and that the tax should have been $14,926—five cents per share on 298,520 shares. These figures were arrived at by taking such proportion of 400,000, the total number of shares authorized, as the actual value of plaintiff's property in Ohio plus its local business in that State is to such actual value plus all its business, and by applying thereto five cents per share.[1] By the decree defendants

[1] The formula employed by the court is the same as the announced rule of the tax commission for the ascertainment of the correct amount of the tax to be paid by foreign corporations, and is taken from the case of *State* v. *Coal Co.*, 17 Ohio Nisi Prius Reports (New Series) 60. It was applied as follows:

$$\frac{\$458,278.56 + \$70,802.30}{\$458,278.56 + \$250,594.58} \times 400,000 = 298,520$$

298,520 x $0.05=$14,926.00.

are enjoined from collecting any part of the tax in excess of $14,926. The plaintiff appealed, and attacks the act on the grounds above stated. Defendants appealed and contend that the lower court erred in finding that 298,520 shares of the authorized capital stock of plaintiff represented the property owned and used and business transacted by it in Ohio, and in enjoining the collection of a tax in excess of $14,926.

In cases involving the validity of the laws of a State imposing license fees or excise taxes on corporations organized in another State, this Court has decided:

"1. The power of a State to regulate the transaction of a local business within its borders by a foreign corporation,—meaning a corporation of a sister State,—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.

"2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.

"3. Consistently with the due process clause, a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State.

"4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a State in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the State cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the State.

"5. A license fee or excise of a given per cent. of the entire authorized capital of a foreign corporation doing

both a local and interstate business in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.

"6. When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the State." *International Paper Co.* v. *Massachusetts*, 246 U. S. 135, 141.

All plaintiff's business, intrastate and interstate, and all its property wherever located were represented by the 50,485 shares of stock outstanding. The annual fee demanded by the state officers is five cents per share on 400,000 shares, and that fixed by the lower court is based on 298,520 shares. The inevitable effect of the act is to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio, and engaged in interstate commerce, wherever the number of shares authorized, subject to the charge of five cents each, exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that State. In this case, the fee fixed by the commission was based on nearly eight times the number of outstanding shares and that determined by the court on nearly six times that number. As some of the outstanding shares are represented by plaintiff's interstate business, the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to

a tax and direct burden upon all the property and business including the interstate commerce of the plaintiff. *International Paper Co.* v. *Massachusetts, supra,* 142. We hold that the act violates the commerce clause.

The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement. Indeed, under the constitution and laws of Ohio, a tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred or its continued annual value thereafter. *Southern Gum Co.* v. *Laylin,* 66 Oh. St. 578. That value depends on the "property owned and used and business transacted" in Ohio. § 8728–11. Plaintiff's authority to issue stock or the number of shares it may have outstanding at any time does not depend upon the laws of Ohio. Under the laws of Delaware where the corporation was organized, these matters are left to the discretion of the persons controlling the corporation. Laws of Delaware 1917, c. 113, § 3; Revised Code, c. 65, 1918a, § 4a. The number of non-par value shares of the corporation is not an indication of, and does not purport to be a representation as to, the amount of its capital. Each outstanding share represents merely an aliquot part of its assets. The number of shares not subscribed or issued has no relation to the privilege held by plaintiff in Ohio, and it is not a reasonable measure of such a fee. Such shares may never be subscribed or issued, or additional shares may be issued to acquire property or do business in other States or to carry on interstate commerce. Plainly the fee, to the extent that it is based on a number of shares in excess of those outstanding, has no relation to what was paid in for the stock or to its value or to the amount of plaintiff's capital, its property or its business,

intrastate in Ohio or interstate. The act in its practical operation does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances. Unless, under the laws of the States where organized they chance to be authorized to issue the same number of non-par value shares, the annual franchise fees imposed on foreign corporations having the same amount of property and business, and exercising the same privileges in Ohio will not be the same; and the charge imposed on one may be many times that made against another. If plaintiff's authorized shares were of the par value of $100 each, the amount of capital stock for apportionment between its property and business in Ohio and its interstate business to arrive at the franchise fee would be $40,000,000; and, adopting the basis of apportionment determined by the lower court which attributed about 75 per cent. of the shares to the property and business in Ohio, the amount of the fee would be $44,778; and with par value of $7 each,—the amount for which the Commissioner of Securities authorized plaintiff to sell its shares in Ohio, and their admitted value,—the amount for such apportionment would be $2,800,000, and the fee would be $3,134.46.[1] These figures are to be contrasted with $14,926, fixed by the lower court. Again, compare two corporations organized in a sister State having the same number of authorized non-par value shares, one having property and business of little value, all in Ohio, and the other having much more property and business in that State, and also much property and business in other States. The act would require the former to pay five

[1] If par value were $100:
298,520 x $100=$29,852,000
$29,852,000 x 3/20 of 1%=$44,778 amount of tax.
If par value were $7:
298,520 x $7=$2,089,640
$2,089,640 x 3/20 of 1%=$3,134.46 amount of tax.

cents per share on all its shares, but would require the latter to pay a fee based only on the proportion of its shares representing its property owned and used and business transacted in Ohio.

It is clear that the mere number of authorized non-par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made. *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415. The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application. *Martin* v. *District of Columbia*, 205 U. S. 135, 139; *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55, 58; *Kansas City Southern Ry. Co.* v. *Road Improvement District*, 256 U. S. 658, 660. The act violates the equal protection clause of the Fourteenth Amendment.

Plaintiff's motion for a temporary injunction should have been granted.

Decree reversed.